This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

At Law and in Equity,

AND IN THE

EXCHEQUER CHAMBER,

In Equity and in Error,

FROM

TRINITY TERM, 56 Geo. III.

TO THE

SITTINGS AFTER HILARY TERM, 57 Geo. III.

BOTH INCLUSIVE.

VOL. III.

By GEORGE PRICE, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:

PRINTED FOR W. CLARKE AND SONS, LAW BOOKSELLERS,
PORTUGAL STREET, LINCOLN'S INN.

1818.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

a.56197

JUL 15 1901

Printed by Lake Hansard & Sons,
near Lincoln's-Inn Fields, London.

A

TABLE

OF THE

CASES REPORTED.

N. B. The Cases printed in *Italics* were cited from MS. Notes.

A.

Page

ABBOTT, Rex v. - - - 178
Anonymous - - - - - - 36
——— - - - - - - 37
——— - - - - - - 253
Atkinson v. Hill - - - - 399
Attorney General v. Hughes 35
- - - - - - - - - - v. Stevens 72
- - - - - - - - - - v. Norstedt 97
- - - - - - - - - - v. Laragoity 221
- - - - - - - - - - v. Case - 302
- - - - - - - - - - v. Brandon 360
- - - - - - - - - - v. Jones - 368
- - - - - - - - - - v. Wilson 431
Austen, Grant v. - - - - 58

B.

Badnall v. Samuel - - - 321
Baker, Palfrey v. - - - - 572
Bailey, Dalzell v. - - - - - 2
Bates, Rex v. - - - - - - 341
Beatson v. Rushforth - - 48
Bickley, Rex v. - - - - - 341
Billingsley, Kingsmill v. - 465
Birdwood v. Hart - - - - 176
Bowyer v. Bright - - - - 300
Bownass, Nicholson v. - - 263
Bowmaker v. Moore - - - 214
Bright, Bowyer v. - - - 300
Brandon, Attorney General v. 360
Braband v. Hoskins - - - 31

C.

Calvert, Turner v. - - - 161
Case Attorney General v. - 302
Clarke v. Mansfield - - - 605
Clarke v. *Porter* - - - - 620
Cokburne v. Hughes - - 408

	Page
Collingridge, Rex *v.*	280
Clent, Nichols *v.*	547
Cripps, Rex *v.*	606

D.

Dalzell *v.* Bailey	2
Ditchett *v.* Tollett	257
Doran *v.* O'Reilly	250
Dwerryhouse v. *Graham*	266

E.

Eagle v. *Garrick*	
Eastmond *v.* Holt	219
Elton, Mills *v.*	142
Ellis, Rex *v.*	325

F.

Frampton, Pedley *v.*	474

G.

Garrick, *Eagle* v.	
Gilbert *v.* Stanislaus	54
Graham, *Dwerryhouse* v.	266
Grant *v.* Austen	58

H.

Harris, Mytton *v.*	19
Hall, Searle *v.*	52
Hart, Birdwood *v.*	176
Hadfield, Wolley *v.*	210
Hill, Stratton *v.*	253
Hill, Atkinson *v.*	399
Hill *v.* Atkinson	399
Holt, Waring *v.*	3
Hoskins, Braband *v.*	31
Holt, Eastmond *v.*	219
Hopper, Rex *v.*	495
Hurd *v.* Partington	222
Hughes, Attorney General *v.*	35
Hughes *v.* Cokburne	465
Hunt, Squier *v.*	68

J.

Jones *v.* Ripley	261
Jones, Attorney General *v.*	221
Jerritt *v.* Weare	575

K.

King (the). *See* Rex.	
Kingsmill *v.* Billingsley	465
Kinnear, Rex *v.*	536

L.

Lewes, Sir Watkin, *v.* Morgan	175
Laragoity, Attorney General *v.*	221

M.

Mansfield, Clarke *v.*	605
Mant *v.* Scott	477
Mills *v.* Elton	142

	Page
Memoranda	473
M'Leod, Rex v.	203
Morgan, Lewes, Sir Watkin v.	175
Moore, Bowmaker v.	214
Mytton v. Harris	19
N.	
Nichols v. Clent	547
Nicholson v. Bownass	263
Norstedt, Attorney General v.	97
O.	
Obee v. Taylor	28
Obee, Ridley v.	26
Obee, Taylor v.	83
O'Reilly, Doran v.	250
P.	
Palfrey v. Baker	572
Partington, Hurd v.	222
Pearson, Rex v.	288
Pedley v. Frampton	474
Phillips, Seal v.	17
Pink, Stoneham v.	263
Plaw, Rex v.	94
Porter, Clarke v.	620
R.	
Rex (in aid, &c.) v. Watson	6
D° v. Rippon	38
Rex (in aid, &c.) v. Hopper	40
D° v. Williams	75
D° v. Plaw	94
v. Towle	145
v. Abbott	178
v. M'Leod	203
(in aid, &c.) v. Hopper	495
v. Stancher	261
(in aid, &c.) v. Sherwood	269
D° v. Thompson	278
D° v. Kinnear	536
D° v. Collingridge	280
D° v. Cripps	606
v. Pearson	288
v. Ellis	323
v. Bates	341
v. Bickley	454
Ridley v. Obee	29
Richards v. Setree	197
Rippon, Rex v.	38
Ripley, Jones v.	261
Robinson v. Wilkinson	538
Rushforth, Beatson v.	48
Russell, Graham v.	229
S.	
Samuel, Badnall v.	521
Scott, Mant v.	477
Seal v. Phillips	17
Searle v. Hall	52
Setree, Richards v.	197
Sherwood, Rex v.	269
Shepherd, Ward v.	607
Stratton v. Hill	253
Stoneham v. Pink	257

	Page
Stanislaus, Gilbert *v.*	54
Stevens, Attorney General *v.*	72
Stancher, Rex *v.*	262
Squier *v.* Hunt	68

T.

Taylor, Obee *v.*	26
Taylor *v.* Obee	83
Thornton, Whitmore *v.*	231
Thompson, Rex *v.*	278
Towle, Rex *v.*	145
Tollett, Ditchett *v.*	257
Turner *v.* Calvert	161

W.

Ward *v.* Shepherd	607
Waring *v.* Holt	3
Watson, Rex *v.*	6
Weare, Jerritt *v.*	
White, Kensington *v.*	164
Whitmore *v.* Thornton	231
Wilson, Attorney General *v.*	431
Wilkinson, Robinson *v.*	538

A

TABLE

OF THE

CASES CITED.

A.

Page.

ATKINS v. *Hatton*, 2 *Anst. Gw.* 1406 - - - 211

- - - - - v. *Lord Willoughby de Broke*, *Gw.* 1412 *Anst.* ib.

Attorney Gen. v. *Wilson* - 444

- - - - - - - v. *Bagg*, *Hard.* 126 - - - - - 293

B

Barnardiston v. *Motteux*, 2 *Doug.* 580 - - - - - - - - 115

Barlow v. *Brent*, 1 *Vern.* 175 - - - - - - - - 244

Benson v. *Offley*, 3 *Mod.* 121 158

Bishop v. *Young*, 2 *B & P.* 78 255

Blackburn v. *Gregson*, 1 *Br. Ch. C.* 423 - - - - - 33

Bowcher v. *Noidstrom*, 1 *Taunt.* 568 - - - - - 309

Page.

Bowdley v. *Bushell*, 1 *Lev.* 116, *and* 1 *Kel.* 602 - - 424

Boultbee v. *Stubbs*, 18 *Ves.* 20 - - - - - - - - - 217

Brandon v. *Payne*, *T. R.* 689 - - - - - - - - 199

Buckridge v. *Ingram*, 2 *Ves.* 652 - - - - - - - - 357

Bulley v. *Blommart*, *Bunb.* - 459

Bush v. *Steinman*, 1 *B. & P.* 404 - - - - - - - - 308

Byron v. *Lamb*, 3 *Gw.* 1197 470

C.

Carborne (*Eliz. and M.*) v. *Scarfe*, 1 *Atkyns* 603 - - 187

Carrington (*Lady*) v. *Cantillon*, *Bund.* 107 - - - - 177

Chapman v. *Bishop of Lincoln*, *Gw.* 679 - - - - 423

Page.

Chenoweth v. *Hay*, 1 *M. & S.* 676 - - - - - - - - 144
Coare v. *Creed*, 2 *Esp.* 699 - 183
Corbyn v. *French*, 4 *Ves.* 430 356
Cotterell v. *Cuff*, 4 *Taunt.* 287 *and Clarke* - - - - - 70
Croft v. *Johnson*, 5 *Taunt.* 319 - - - - - - - - 216
Cross v. *Smith*, 2 *Raym.* 838; *and Salk.* 148. *S. C.* - - 293
Crook v. *Eyles*, 2 *Marsh.* 49; 6 *Taunt.* 847 - - - - - 296

D.

De Burnales v. *Fuller*, 14 *East.* 590 - - - - - - 63
Dias v. *Freeman*, 5 *T. R.* 195 - - - - - - - - 18
Dodsworth v. *Bowen*, 5 *T. R.* 325 - - - - - - - - 294
Doe v. *Redfern*, 12 *East*, 96 458
Doyley v. *Hornby*, 3 *Gw.* 714 - - - - - - - - 469
Dobson v. *Lockhart*, 5 *T. R.* 138 - - - - - - - - - 230

E.

Eckhardt v. *Wilson*, 8 *T. R.* 148 - - - - - - - - 14
Ewer v. *Jones* - - - - - 114

F.

Fawell v. *Heelis*, *Ambler* 726 33
Fenner v. *Meares*, 1 *H. Bl.* 1269 - - - - - - - 62
Finch v. *Squire*, 10 *Ves.* 41 - 347
Fletcher v. *Braddick*, 2 *N. R.* 186 - - - - - - - 308

Page.

Foster's C. L. 351, 3*d Ed.* - 151
French v. *Fenn*, *Coke's Bankrupt Law*, 555, 6*th Ed.* - 231

G.

Gimmingham v. *Laing*, 2 *Marsh.* 240 - - - - - - 144
Glennie v. *Edmunds*, *Taunt.* 775 - - - - - - - - 230
Gray v. *Sydneff*, 3 *Bos. & Pul.* 395 - - - - - - 200
Graham v. *Grill*, 2 *M. & S.* 294 - - - - - - - - 282
Green v. *Farmer*, *Bur.* 2215. 1 *B. C.* 651, *S. C.* - - 233
- - - - v. *Waller*, 2 *Ld. Raym.* 893, 935 - - - - - - 113
Grimwood v. *Barrit*, 6 *East*, 460 - - - - - - - - 56

H.

Hardcastle v. *Slater*, 4 *Gw.* 1342, *Gw.* 790 - - - - - 211
- - - - - - - v. *Smithson*, 3 *Atk.* 245 - - - - - - - 424
Hancock v. *Entwistle*, 3 *T. R.* 435 - - - - - - - - 230
Hawkes v. *Brayfield*, *Cro. Jac.* 137 - - - - - - 330
Heathcote v. *Paignon*, 2 *Bro.* 175 - - - - - - - - 87
Hewett v. *Adams*, *Rayner's Tithe Cases*, 990; *and Gw.* 1204 - - - - - - - - 330
Hodgson v. *Nugent*. 5 *T. R.* 277 - - - - - - - - 217
Hodges v. *Steward*, *Skin.* 346 - - - - - - - - 256
House v. *Chapman* - - - 357

Page.

Huchins v. *Maughan*, 3 *Gw.* 1197 - - - - - - - - 470
Huchinson v. *Hardcastle*, *Barnes* 103 - - - - - 259
Hunter v. *Gray*, *Barnes* 493 4
Hyde v. *Cogan*, *Doug.* 699 - 51
Hughes v. *Cornelius*, 2 *Show.* 232 - - - - - - - - 112

I.

Israel v. *Douglas*, 1 *H. Bl.* 239 - - - - - - - - 63

J.

Johnson v. *Smith*, *Bur.* 959 294
Jones v. *Le David*, *Gw.* 1336 470

K.

Keddington v. *Bridgman*, *Bun.* 2 - - - - - - - 330
Kindersley v. *Chace*, *Parke's Ins.* 547 (7th ed.) - - - 115
Knapp v. *Williams*, 4 *Ves.* 430 347
Knight v. *Halsey*, 7 *T. R.* 93 420
Koster v. *Easton*, 2 *M. & S.* 423 - - - - - - - - 237

L.

Ladbroke v. *Crickett*, 2 *T. R.* 649 - - - - - - - - 114
Lane v. *Cotton*, *Raym.* 650 & 12 *Mod.* - - - - - - 313
Lander v. *Cokayn*, *Barnes*, 44 - - - - - - - - - 199
Law v. *Hollingworth*, 7 *T. R.* 160 - - - - - - - - 312
Ledger v. *Langley*, 1 *Sid.* 283 - - - - - - - - 418

Page.

Lockhart v. *Mackreth*, 5 *T. R.* 661 - - - - - - - - 200
Long v. *Duff*, 2 *Bos. & Pul.* 209 - - - - - - - - 435
—— v. —— 2 *B. & P.* 209 437
Lothian v. *Henderson*, 3 *Bos. & Pul.* 499 - - - 115

M.

Markham v. *Huxley*, 4 *Gw.* 1499 - - - - - - - - 430
—— v. *Laycock*, 4 *Gw.* 1339 - - - - - - - 211
Middlesex v. *Fenton*, 1 *Taunt.* 23 - - - - - - - - 36
Minnett v. *Robinson*, *Bunb.* 121 - - - - - - - - 124
Morris v. *Hayward*, 2 *Marsh.* 280 - - - - - - - - 224
Moulsdale v. *Birchall*, 2 *Bl.* 820 - - - - - - 62

N.

Nairn v. *Prowse*, 6 *Ves.* 760. 33
Nicholson v. *Mounsey*, 15 *East*, 384 - - - - - - 312

O.

Olive v. *Smith*, 5 *Taunton*, 56 - - - - - - - - 232
Olive v. *Smith*, 2 *M. & S.* 112 - - - - - - - - 236

P.

Pearce v. *Cowie*, *Camp. vol.* 4. *p.* 364, *and note p.* 69 - 435
—— v. *Glover*, *Sitting* *K. B. M.* 15 *G.* 3, *not reported* - - - - - - - 441

Page.

Penny v. *Porter*, 2 *East*, 2 56
Petyt v. *Berkeley*, *Cowp.* 511 4
Pickering v. *Dawson*, 4 *Taunt.* 779 - - - - - - 57
Pickett v. *Loggon*, 14 *Ves.* 215 - - - - - - - - 90
Pickstock v. *Lyster*, 3 *Maule & Sel.* 371 - - - - - 11
Phillips v. *Shaw*, *Anstr.* 162 76
Prince v. *Nicholson*, 5 *Taunt.* 333 - - - - - - - - 200

R.

Rawson v. *Johnson*, 1 *East Rep.* 207 - - - - - - 69
Reid v. *Clarke*, 7 *T. R.* 496 49
Reid v. *Darby*, 10 *East*, 144 105
Rex v. *Bulley* - - - - - - 457
- - v. *Judd*, 2 *Term Rep.* 255 - - - - - - - - 50
- - v. *Sheriff of Middlesex*, 3 *M. & S.* 299 - - - - 52
- - v. *Blatchford*, 8 *Ves.* 241 76
- - v. *Blackett*, 1 *Price*, *p.* 96 76
- - v. *Wilton*, *vol.* 2, *p.* 368 77
- v. *Mainwaring*. *Ante*, *vol.* 2, *p.* 67 - - - - - - 108
- - v. *Kirk*, *M. S.* - - - 283
- - v. *Skingle*, 1 *Strange*, 00 - - - - - - - - 332
- - v. *Borthwick*, *Doug.* 207 - - - - - - - - - 151
- - v. *Francis*. *Str.* 1015 - 151
v. *Page*. *Aleyn*, 43; *Stiles*, 86 - - - - - - 152
- v. *Gibson*, 1 *East*, *P. C.* 413 - - - - - - - - 15
- - *Copeland*, *Hughes Rep.* 204 - - - - - - - - 273

Page.

Rose v. *Calland*, 5 *Ves.* 188 301
Robinson v. *Moon*, 5 *T. R.* 488 - - - - - - - - 199
Roe v. *Dawson*, 1 *Ves.* 331 62
Ryall v. *Rowles*, *ib.* 362, 363, 367 - - - - - - - - 62

S.

Scellinger v. *Blackerby*, 2 *Bl.* 347 - - - - - - - - 62
Scott v. *Schawrtz*, *Com. Rep.* 677 - - - - - - - - 442
Sewell v. *Roy*, *Ex. Assur. Comp.* 4 *Taunt.* 856 - - 441
Shallcross v. *Jowle*, 13 *East*, 261 - - - - - - - - 418
Shipley v. *Cooper*, 7 *T. R.* 698 4
Smyth v. *Sambrook*, 1 *M. & S.* 66 - - - - - - - - 419
Snow v. *Hewitt* - - - - 419
Sone v. *Ashton*, 3 *Bun.* 1288 332
Sone v. *Skingle* - - - - 336
Staniforth v. *Fellows*, 1 *Marsh.* 184 - - - - - - - - 238
Stockwell v. *Terry*, 1 *Ves.* 117 - - - - - - - - 470
Symons v. *Knox*, 3 *Term. Rep.* 65 - - - - - - - 56

T.

Tennant v. *Stubbing*. *Anstr.* 643 - - - - - - - - 414
Thorold v. *Thorold*, 1 *Phil. p.* 1. - - - - - - - - 381
Thomas v. *Young* - - - - 217
Trewin v. *Bond*, 1 *Wood*, 398; *Gw.* 565 - - - - - - 419
Twistleton v. *Griffith*, 1 *P. W.* 311 - - - - - - 87

Page.

W.

Warwick v. *Collins*, *M. & S.* 349 - - - - - - - - 469

Webber v. *Taylor*. *Sel. Cas. in ch.* 52, *& Gw.* 656; *Startup* v. *Dodderidge*, 2 *Gw.* 587 - - - - - 415

Welsh v. *Craig*, 8 *Mod.* 1 *Strange*, 680. *S. C.* - - 254

Whightman v. *Thomson*, 1 *Wil.* 245 - - - - - - 5

Wilks v. *Atkinson*, 1 *Marsh.* 512 - - - - - - - - - 71

Williams v. *Everett*, 14 *East*, 582 - - - - - - - - 61

Witt v. *Buck*, 3 *Bulstr.* 166, *and* 4 *Gw.* 1574 - - - 469

Wills. *East*, *P. C.* 414; *Starkie*, *Cr. Pl.* 400 - - - 151

Underhill v. *Harwood*, 10 *Ves.* 209 - - - - - - - 87

JUDGES

OF THE

COURT OF EXCHEQUER,

During the Period of these Reports.

The Right Honourable Sir R. RICHARDS, Knt. L. C. B.
Sir ROBERT GRAHAM, Knt.
Sir GEORGE WOOD, Knt.
Sir WILLIAM GARROW, Knt.

Sir S. SHEPHERD, Knt. Attorney General.
Sir R. GIFFORD, Knt. Solicitor General.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

AND

EXCHEQUER CHAMBER.

TRINITY TERM,

56 GEO. III.

AND

THE SITTINGS AFTER.

MEMORANDUM:

IN this Term *John Hillock*, esquire, of *Gray's Inn*, was called to the degree of Serjeant at Law. His rings bore the motto, '*Auspicium melioris ævi.*'

1816.

Saturday, 15th June.

DALZELL *v.* BAILEY and another, Executors, &c.

The Court will not order a cause set down for hearing, to be advanced in the paper, on the ground that the subject matter of the suit is an arbitration of matters of account; and that if the award should be set aside, the applicant would, on going into the account again, lose the advantage of a material and essential witness, who is old and bedridden, and not expected to live.

RAITHBY moved to advance this cause in the paper, on an affidavit, stating, that the plaintiff had filed a bill against defendants in *Easter* Term, 40 *Geo.* III, praying that the award therein mentioned might be set aside; and for an account, and injunction to restrain proceedings at law in the mean time;—that the suit was afterwards revived, and defendants had put in their answers, and that the arbitrator having been examined on the part of the defendants, the cause had been set down, and was in the paper for hearing; and that if the Court should decree that the award should be set aside, and an account taken, as prayed, it would be necessary that the accounts between plaintiff and the testator should be again gone into;—that in support of such account of the estate of said testator, *Robert Dalzell* was a material witness on the part of the defendants; that he was in the 73d year of his age, and infirm and bedridden, and not expected to live, whereby defendants were likely to lose the benefit of his evidence in support of the estate of their testator, in case of such a decree as aforesaid, unless his evidence could be sooner obtained.

Thus, the application rested merely on the ground of the evidence of a material witness for the defendants being likely to be lost to them, unless the indulgence sought was granted by the Court.—It was very strongly pressed, as a motion founded in

1816.

DALZELL v. BAILEY and another, Executors, &c.

in justice to the applicant, whose merits depended almost entirely on the witness in question; and if the award should be set aside, and he should die in the mean time, they would have no chance of succeeding before another arbitrator. The learned counsel acknowledged that the motion was quite novel; but submitted, that under the circumstances, there was reason to hope that the Court would assist the defendants, by granting a rule to show cause why the order should not be made.

The Motion was refused.

1816.

Tuesday, 18th June.

WARING *v.* HOLT.

The defendant cannot, in this Court, change the venue, after having obtained an order for time to plead "*on the usual terms*" generally. It is considered to be one among what are commonly expressed in the order to be the usual terms imposed by it on giving time, that the defendant shall not afterwards move to change the venue.

When the order is intended to be without prejudice to a change of venue, it should be so expressed in the summons for attending the Judge.

Nor will the Court order a change of venue in such a case, although the defendant proposes to give judgment of the term.

JONES, D. F. opposed the present application made by *J. Clarke*, for changing the *venue* in this action (for goods sold and delivered) from *Middlesex* to *Lancaster*, on the usual affidavit.

The *quo minus* issued on the 2d *May*, returnable the 15th, and the declaration was delivered *de bene esse* the same day, to plead in eight days.

The defendant had taken out a summons for *time to* plead, which was endorsed by the plaintiff's

1816.

WARING v. HOLT.

attorney, and an order was drawn up on the 27th *May*, giving the defendant a week on *all the usual terms* *.

The motion was opposed on the ground that one of those terms was, *that the defendant should not move to change the venue*; and it was therefore submitted, that it was now too late to make this application, which, if it succeeded, would have the effect of deferring the plaintiff's judgment, if he should recover in the action, till the next *Michaelmas* Term; and such a practice, if permitted, would often in *Trinity* Term enable a defendant to get over the long vacation. To show that an undertaking not to move to change the *venue*, is always considered one of the usual terms imposed on a defendant obtaining time to plead, it was said to be customary, whenever it is intended that the common order shall not have such an effect, to introduce in the summons, that it shall be "without "prejudice to the defendant's moving to change "the *venue*;" and summonses in the King's Bench, having an express stipulation to that effect, were produced, for the satisfaction of the Court, as to that point.

[He cited *Petyt* v. *Berkeley (a)*, *Hunter* v. *Gray (b)*, and *Shipley* v. *Cooper (c)*, where the

* Pleading issuably; rejoining gratis; taking short notice of trial; and *not*, (as now decided,) *afterwards moving to change the venue.*

(a) Cowp. 511. (b) Barnes 493.
(c) 7 T. Rep. 698.

Courts

Courts of King's Bench and Common Pleas refused to change the *venue* after the defendant had obtained an order for time to plead.]

The criterion seems to be, whether or not a trial would be lost by the delay; and here it is obvious that that would be the effect of the change of *venue* now sought.

CLARKE, J. *contra*, contended that it was not one of the usual terms that the defendant should not be afterwards at liberty to move to change the *venue*. In the present instance, the order was general on the usual terms, that is, pleading issuably, rejoining gratis, and *taking short notice of trial*; but it is not added, *for the first Sittings in London or Middlesex*. In all the cases which have been cited, the order was drawn up on the express terms that the defendant should accept short notice of trial *for the first Sittings in London or Middlesex*.

He then cited the case of *Wightman* v. *Thomson (d)*, where the *venue* was ordered to be changed after a judge's order for time to plead. In that case, also, one of the terms expressed, was, that the defendant should take short notice of trial for the Sittings within term in *Middlesex*; which may be the reason why that decision has not been always followed. In *Tidd*'s practice *(e)*, it is said that a defendant may move to change the *venue* at any time before plea pleaded, and that *even after an*

(d) 1 Wilson 245.

(e) P. 609 (5th ed.)

order

1816.

WARING v. HOLT.

order for time to plead, though upon the terms of pleading issuably; and the cases cited there in support of that doctrine, are *Say. Rep.* 207; *Saxby* v. *Lys*, M. 26 *G.* 3, K. B.; *Hudson* v. *Needham*, T. 27 *G.* 3, K. B. In this case, the terms are left general and undefined, and the question is, whether it be one of the usual terms that the *venue* shall not be changed.

Per Curiam.—The defendant, by having obtained time to plead on the usual terms, has precluded himself from making this motion.

Order refused †.

† It was then proposed to give judgment of the present Term; but the Court still refused.

1816.

Tuesday, 18th June.

The KING (in aid of BRADDOCK) *v.* WATSON and another.—(Demurrer.)

Replication to a plea (in bar to an Extent in aid), that defendant was trustee under a prior deed of assignment for the general benefit of all the insolvent's creditors; —that the prosecutor of the Extent was indebted to the Crown before and at the time of executing the deed;—that the insolvent then carried on trade, and was not then seised of lands, &c.;—that the insolvent was then indebted to the prosecutor;—and that the prosecutor had not executed the assignment, held bad on general demurrer.

THE facts and pleadings on which this demurrer arose were as follows:—*Braddock* being found indebted to the Crown, by inquisition on an Extent, for duties of Excise on malt and beer, obtained an

Such an assignment is not fraudulent against such a creditor, unless there have been a commission of bankrupt sued out.

Nor can such a deed be avoided by the effect of an Extent, as a commission of bankrupt may.

Extent

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

Extent in aid against *Joseph Wheeler*, tested 21st *August* 1815, who was thereupon found, by inquisition, indebted to *Braddock* in the sum of 18*gl.* 14*s.* for beer sold and delivered; which debt was returned by the sheriff of *Suffolk* as seized. He also returned, that it was found by the jury, on the inquisition taken on the Extent against *Wheeler*, that *Watson* (the defendant) had received, and had then in his hands, the sum of 147*l.* 1*s.* received by him, as one of the trustees, under a deed of assignment, dated 28th *February* then last, and made between said *Wheeler* of the first part, said *Watson* and plaintiff *Batterbee* (creditors of *Wheeler*, of the second part, and several other persons, also creditors of *Wheeler*, of the third part) which was executed by said *Wheeler*, said *Watson*, *Edward Drewe*, and said *Batterbee*, but by no other creditors of said *Wheeler*, and particularly not by *Braddock* (the prosecutor) and *Cornelius Elven*;—that *Wheeler*, at the time of the said assignment, and then (on the taking the inquisition) was indebted to *Braddock* in the sum of 180*l.* and upwards;—that *Wheeler* was a trader within the bankrupt laws,—and that he (the sheriff) had seized the said sum of 147*l.* 1*s.* into his Majesty's hands, as commanded by the writ.

The defendants came in and claimed the money due from *Wheeler*, and so seized, and having craved oyer of the Extent, pleaded (protesting the insufficiency of the said writs) the said assignment of all the insolvent's estate and effects to

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

them *in trust for the benefit of all his creditors*, setting out the date and the contents of the deed at length; in which there was a provision that, in consideration of such assignment, they should take the same, and the monies to arise therefrom, *in full satisfaction and discharge of their several and respective debts then due and owing to them, and release the said Wheeler therefrom.* The plea then averred the delivery of possession to defendants by *Wheeler*, under the deed and in execution thereof, before the issuing of the said writs of extent.—That the debts then and still due and owing from *Wheeler* to the defendants and *Edward Drewe*, amounted, in the whole, to the sum of 500*l.* being a larger sum of money than the said sum of 147*l.* 1*s.* received by *Watson*; and also exceeding the value of all the goods and chattels, debts, sums of money, and other things by the said indenture bargained and sold as aforesaid;—that *Wheeler* was not, at the time of the execution of said indenture, nor at the time of the sale and disposal of the said goods and chattels, nor of the receipt and recovery of the said debts and sums of money by *Watson* and *Batterbee*, or of any part thereof, a debtor or accountant of the Crown;—and that the said indenture was *bonâ fide* and without fraud for the benefit of all such of the creditors of *Wheeler* as should chuse to take the benefit thereof, and without any intent to deceive or defraud the Crown, or *Braddock*. All which matters and things defendants were ready to verify; wherefore they prayed judgment, and that the King's hands might be amoved, &c.

To

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

To that plea the Attorney General replied, that the King's hands ought not to be amoved, for that (protesting the sufficiency of the plea,) the said Attorney General saith, that at the time of the taking of the said inquisition in the said writ of Extent against the said *Joseph Wheeler* first mentioned, and so as aforesaid, &c. the said *Henry Braddock*, in, *&c. was indebted to our said Lord the King*, in manner and form, &c. and from thence hitherto hath been and still is indebted, to wit, at, &c. and that before and at the time of the sealing and delivery of the said supposed indenture of assignment, in, &c. the said *Joseph Wheeler carried on trade and commerce as a cordwainer, and sought his living by buying and selling*, to wit, at, &c.; and that the said *Joseph Wheeler was not, at the time of the sealing and delivery of the supposed indenture as aforesaid, seised in his demesne as of fee, or in his demesne as of freehold, of any lands, tenements or hereditaments whatsoever*; nor was he at that time seised, possessed of, or entitled to any copyhold or customaryhold lands, tenements or hereditaments whatsoever: and that before and at the respective times of sealing, &c. and of the taking of the said inquisition on the said writ of Extent against the said *Joseph Wheeler* secondly mentioned, and so as aforesaid, taken on the said writ of Extent against the said *Henry Braddock*, therein also mentioned, the said *Joseph Wheeler* was justly and truly indebted to said *Henry Braddock* in the said sum of 189*l.* 14*s.* in manner and form, &c. and from thence, &c. to wit, &c.; and that *the said Henry Braddock hath not signed, sealed,*

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

sealed, or delivered the said supposed indenture of assignment in the said plea of the said defendants mentioned, and so the said Attorney General saith, that the said supposed indenture is fraudulent and void, to wit, at, &c. *paratus est verificare*, praying judgment, and that the hands of his said Majesty might not be amoved, &c.

To the replication there was a general demurrer, in which the Attorney General joined.

Platt now argued in support of the demurrer, premising that the present question, (raised by the inference of law, intended to be deduced from the facts detailed in the replication, that the deed was fraudulent, and therefore void against the person using the Crown process,) was, shortly, whether the assignment was, under all the circumstances, fraudulent in the eye of the law, and therefore a nullity: or, *bonâ fide*, and valid. It was submitted, that whatever advantages the prerogative process usually conferred on the person in whose aid it was employed, it did not give the Crown debtor new rights, nor could it discharge his debt of the equities, to which in other cases it would be subject. The writ is a more summary and expeditious mode of recovering a debt; but when it has to conflict with equal claims, even in the case of the Crown itself, it must proceed *passibus equis*. Thus, if the Crown debtor were a mortgagor, a pawnor, or a lessor, the Crown could not, by its process against persons in either of those characters, suppress the incumbrances and acquire a greater interest than that

that of the mortgagor, pawnor, or lessor, but must take the property subject to the mortgage, the pawn, or the lease. So neither can the Crown seize presently a debt due to its debtor *solvendum in futuro*.

If the assignment had been executed before *Wheeler* had become indebted to *Braddock*, it must be admitted that the Crown would have been bound by it, and could not seize for a debt which accrued due afterwards: whence it may be contended, that whatever can give validity to the deed as against *Braddock*, will also support it against the Crown, who cannot be put in a better situation than *Braddock* himself, (through whom, and by whose title it must claim,) would have been. In short, if this assignment was not antecedently void or avoided, as against *Braddock*, the proceedings under the Extent could not have the effect of avoiding it.

That an assignment of all his effects by a trader, for the general benefit of those of his creditors who chuse to come in, is not fraudulent as against the others, has been recently held in the case of *Pickstock* v. *Lyster (a)*, which was certainly a very strong case, for there the assignment of the insolvent's effects, which was not signed by any of the creditors, was not executed till after the plaintiff had obtained judgment by default. The words of Lord *Ellenborough* are strongly applicable to the

(a) 3 Maule & Selwyn 371.

present

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

present case. His Lordship says (after expressing an apprehension that extensive mischief would ensue from countenancing the objection of fraud to such assignments, and citing cases where it had been held that an executor might give preference to some creditors pending a suit by another creditor) "the "principle of those decisions would be destroyed, if "we should hold an assignment fraudulent because it "may operate to the prejudice of a particular credi- "tor;" then referring the assignment in that case to an act of duty rather than fraud, inasmuch as by it the fund was made available for the whole body of creditors, his Lordship adds,—"it is not the debtor who "breaks in upon the rights of the parties by this "assignment, but the creditor who breaks in upon "them by proceeding in his suit. I see no fraud; "the deed was for the fair purpose of equal distribu- "tion." So here, while *Braddock* is endeavouring to sweep away all the insolvent's property for his own exclusive benefit, *Wheeler* commendably defeats that purpose by this just and equal assignment, which the Court of King's Bench have held to be a moral duty, and the language of the rest of the Court is equally strong and pointed as to that effect of the deed. Had *Braddock* been excluded from, or had he not had notice of the deed, it might have varied the case; but that was not so.

There is certainly, however, a distinction in the case of *Pickstock* and *Lyster*, and the present, in one respect, which will probably be much relied on by the counsel for the prosecutor; that is, that in this case the debtor is by the demurrer admitted to

be

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

be a trader, whereas it does not, it must be acknowledged, appear by the report that *Glover*, the insolvent, in the case cited, was so. It does not, however, on the other hand, appear that he was not. But admitting for a moment that he was, the use to be made of that circumstance must be, that his property was subject to be affected by the bankrupt laws, and that therefore the deed was fraudulent and void. The answer to that is, that the circumstance of his being a trader would not of itself and alone place him in a situation to be liable to the statutes of bankruptcy. There must also be a subsisting petitioning creditor's debt, and an act of bankruptcy committed, neither of which appear by these pleadings to have existed; and if that were not so, no creditor of *Wheeler*'s could have compelled a rateable dividend of his effects by those laws, nor even then, unless an actual valid commission had been sued out: on that ground, therefore, all objection of fraud is obviated. But that every deed of assignment executed by a trader is not *ipso facto* fraudulent and void, is quite clear; for it is not unfrequent that traders executing deeds of assignment, afterwards pay 20*s.* in the pound; in that case nobody would be defrauded; and therefore, if the proposition were received so generally, the absurdity might be incurred of pronouncing an act fraudulent, by which no one can be defrauded. This replication has not, therefore, by its several averments, surrounded the deed of assignment with any of those circumstances of fraud which would necessarily render it void, as against *Braddock*; and if it be good against him, it is also valid against the Crown, who

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

who can only be entitled to his interest in the claim.

Walton, in support of the replication, admitted the sole question to be as stated, and submitted that this assignment was fraudulent under the statute of 13 *Eliz.* as against *Braddock*, and might therefore be avoided by him. (This was the more strongly pressed in the present instance, from the fact of there being inserted in the assignment a condition to be imposed on all who should entitle themselves to benefit under it by signing it, that they should release the debtor from the rest of their demands, in consideration of such dividend as they should receive.)—That he *(Braddock)* had not signed the deed, nor had any other creditor of *Wheeler*, except one besides the trustees; and that, therefore, if the deed was not *ipso facto* void, it was avoidable by him as delaying the recovery of his debt; and also operating to compel him to accede to a composition, which the bankrupt laws could not force him to submit to. A creditor may object to sign a bankrupt's certificate, whereby he keeps his future effects liable: *à fortiori* may he, an insolvent's assignment.—That the non-assent of some of the creditors to a deed of assignment, renders it fraudulent and void, was decided in *Eckhardt* v. *Wilson (b)*.

[GRAHAM, *Baron*. In that case there was an actual commission of bankrupt taken out.]

(b) 8 T. R. 148.

But

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

But the Court held it void under the statute of *Elizabeth*.

The case of *Pickstock* v. *Lyster*, was admitted to bear apparently against the replication, but it was contended that that case was distinguishable, as had been fairly observed; for it did not there appear that *Glover* was a trader, and the argument did not proceed on his liability to the bankrupt laws; whereas, in this case, the substratum of the argument is, that *Wheeler* was a trader, and therefore his creditors were not bound, and might have resorted to any remedy they pleased against the effects assigned.

There is also another argument arising in this case, on the question whether the Crown proceeding by Extent, not being bound or privileged by the bankrupt laws, and those who are armed with that prerogative process, have not, *pari ratione*, a superior right to avoid the deed, as it would have had in case a commission had issued. The assignment was clearly an act of bankruptcy, and a commission might have been taken out on it; and that there was a good petitioning creditor's debt, is confessed by the pleadings, independent of the finding. It is therefore fraudulent under the bankrupt laws, and void against the creditors who did not execute it.

Per Curiam.—There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors, *Braddock* as well as the rest. Nor is any such inference

1816.

The KING (in aid of BRADDOCK) v. WATSON and another.

inference to be drawn from the facts averred in the replication. It would have been a different thing, if there had been a commission of bankrupt sued out, and the property had been divested. This is a very common arrangement, which it would be very injurious to disturb, where there has been no commission.

Judgment for the Defendants.

Walton applied for leave to amend, which was refused; the Court saying that no amendment could assist him.

RICHARDS, *Baron*, observed, that as far as the facts in the case of *Pickstock* v. *Lyster*, were brought before the Court of King's Bench, the decision was right. But that he had no doubt on the trial, that the deed was executed under unfair circumstances, and with an intention to defraud the judgment creditor. One fraudulent part of the case, which was left to the jury, was, that the deed was executed just as the execution was coming in; on the merits, therefore, that is a bad decision. But that case was decided by the Court of King's Bench, on the other ground of the assignment being for the equal benefit of all the insolvent's creditors. Such a deed certainly ought not to be avoidable by any particular creditor not attempted to be excluded from the benefit of it; and no such attempt has been made in the present instance.

SEAL

SEAL (Assignee of the Sheriff of Hereford) *v.* PHILLIPS and others.

1816.

Wednesday, 19th June.

A defendant in replevin is not entitled to an assignment of the replevin bond on the plaintiff's neglecting to declare at the next county court, if he himself have not then appeared to the summons.

And if he obtain an assignment, and bring an action, the Court will stay the proceedings (on an affidavit being made, that a writ of *recordari fac. loquelam* has been sued out), without payment of costs by the defendant, which will be ordered to abide the event of the proceedings on the *re. fa. lo.*

THE plaintiff, as assignee of a replevin bond, had brought an action against the defendant, and in the course of last *Easter* Term, *Dauncey* obtained a rule to show cause why the proceedings in that action should not be stayed; the defendant having issued a writ of *recordari facias loquelam*, to remove the proceedings from the County Court into the Court of Common Pleas. The application was made on an affidavit of service of the notice of motion, and of the *recordari fac. loq.* having been issued, and delivered to the under-sheriff.

It appeared by the defendant's affidavit, that on the 20th of *April*, the plaintiff had distrained for half a year's rent, amounting only to 6*l.* 10*s.* The goods being replevied on the 21st, the sheriff summoned the plaintiff to appear at the next County Court, (24th *April*);—that defendant did attend, but finding that no appearance was entered, he did not declare, under a notion that he was not bound to declare till the defendant (in the replevin) had appeared;—that he was ready to have declared, and that he had merits, the rent distrained for not being then due.

Owen now showed cause. He submitted, that this application being for an indulgence to get rid of a regular proceeding, ought to have been moved

1816.

SEAL (Assignee of the Sheriff of Hereford) v. PHILLIPS and others.

on payment of costs;—that this was not a case for the interference of the Court to stay proceedings, as the defendant had neglected his duty to the delay of the plaintiff, in not appearing and prosecuting his suit according to the condition of the bond; —that the party swearing he did not know that he ought to have declared, was no excuse; and as to having merits, the rent not being due when the distress was made, that cannot be tried on affidavits. It was peremptory on the plaintiff (below) to have declared at the next County Court, and if he does not, the defendant (below) is entitled to proceed on the replevin bond, as the plaintiff has done, and on that point he cited *Dias* v. *Freeman(a)*, where it was held that the plaintiff was entitled to sue on a replevin bond if the defendant had not prosecuted his plaint with due diligence.

Dauncey, in support of the rule, submitted that as it was in consequence of the plaintiff's original neglect in not appearing to the summons, that the defendant had not declared he had no right to complain of the irregularity of defendant's not declaring, even if under such circumstances, he were bound to have done so: it is sworn, that but for that, the defendant would have declared.

[WOOD, *Baron*. Inquiring if a plaint had been levied: it was said that the bond supposes that, without which, the defendant would not have been permitted to replevy.]

(a) 5 T. R. 195.

A writ

1816.

SEAL (Assignee of the Sheriff of Hereford) v. PHILLIPS and others.

A writ of *recordari facias loquelam*, returnable the 18th *May*, has been sent to the sheriff, but he has refused hitherto to return the writ, alleging that he has assigned the bail bond.

The Court made the rule absolute for staying the proceedings on the bond assigned, and ordered the costs to await the event of the cause, on the writ of *rec. fac. loquelam*.

Rule absolute.

1816.

Thursday, 20th June.

MYTTON *v.* HARRIS.

Old terriers, recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus attempted to be established, by proof of a money payment having been uniformly rendered within living memory, and the absence of any evidence even of reputation that the tithe had ever been taken in kind: and that although such terriers are not proved to have been signed by any person interested in the farm.—WOOD, B. *dissentiente*.

Nor will the Court grant an issue in such a case.

Modus of 10*d*. a score for agistment of sheep, bad.

THE plaintiff, who was rector and vicar of the parish church of *Llandyssel, (Montgomeryshire)* filed this bill against the defendant for tithes of hay, clover, and clover-seed, gathered on a certain farm occupied by her in that parish, called *Brynyderwin*, and for tithe of agistment.

The plaintiff had at first prayed an account of tithe of corn and grain; but the defendant having pleaded an annual composition in bar, the bill was amended by omitting that claim.

1816.

MYTTON v. HARRIS.

To the present suit the defendant set up the following moduses—(having fully described the extent of her farm, both according to its ancient parcels, and those which had been recently substituted for some of them, under a modern inclosure act)—A farm modus of 19*s.* *per annum*, in lieu of tithe in kind, of all grass whatsoever cut or mown, and made into hay, in and upon the said ancient farm, or the titheable places thereof:

Three-pence *per annum* for and in lieu of the tithes of milk and calves of every cow having calf in the course of the year; and

One penny for every milch cow, being barren and not having a calf in the course of the year, which were fed and depastured on the said farm—all payable at *Easter*.

A further modus was set up of 10*d.* *per* score for and in lieu of the agistment tithe of all sheep agisted for hire throughout the parish belonging to persons not resident there.

The defendant, to prove these moduses, examined many witnesses, who deposed to the sum of 19*s.* having been paid for a long time back, as well as other various but fixed moduses for hay and grass throughout the parish; and that tithe in kind had never, within memory, been received or demanded for hay or grass made or cut in the parish. They also proved that there had ever been paid, within their memory, to the rector, 10*d.* a score for hogs

or

or yearling sheep depastured in the parish, belonging to persons not residing therein, and 2 *d.* a-piece for lambs.

In opposition to this evidence, the plaintiff put in several terriers—the first was dated 5th *March* 1663, and was in these words: "Imprimis, there "is due to the parson and vicar the tenth of all "corne and graine, hey and herbege, pig and "geese, wool and lam, hemp and flax, and other "small commodities; and the tenth is parted be-"tween the parson and vicar; to the parson two "parts, and the vicar the other." Signed by the then vicar and eight of the inhabitants. Another, of the 13th of *July* 1675, in the same words, signed by the then minister and churchwardens, and five of the inhabitants. The third was dated in 1684, and recorded, *that* "The tithes of the parish aforesaid, "both small and great, with *Easter* duties, wool, "lamb and kid, hay and graine, lactualls, pig and "geese, hemp and flax, and honey, are to be paid "in kind, if required; and there is noe custom, "usage, or prescription to the contrary." Signed by the rector, the churchwardens, the overseer, and eight other parishioners.

There was no other terrier found from that time till the year 1774, but in that year one was signed by the curate *(Llewellin Davies)*, to the following effect: "The rector is entitled to all tithes in kind "(except a modus in lieu of tithe hay) from every "farm in the parish." The next is dated 28th *May* 1777, and is also signed by the same curate,

1816.

MYTTON v. HARRIS.

(who, in his deposition for the plaintiff, states, that *he signed it at the particular request of the officers and parishioners, in order to establish the moduses,)* and is thus entitled, "A terrier of the modus in "the parish of *Llandyssel* and diocese of *St. Asaph*, "in lieu of tithe hay delivered into Court the 28th "*May* 1777." It then states various different sums paid by the several farms in the parish, and amongst the rest 19*s.* by the defendant for the farm then occupied by her. The next, in *July* 1791, was to the same effect, also signed by *Davies*.

Davies was the only witness examined by the plaintiff, and he deposed that he had heard an old inhabitant of the parish, who acted as vestry clerk, say that he had seen an ancient terrier which required tithe-hay to be taken in kind.

Dauncey, *Benyon*, and *Hall*, for the plaintiff.

Martin and *Owen* for the defendant.

THOMSON, *Chief Baron*, having stated the case, observed, that the only point of contest was, whether the several moduses had been sufficiently proved to enable the Court to establish them in the first instance; or, whether the evidence left them so doubtful as to render an issue necessary.

The modus of 10*d.* a score for hog sheep, and 2*d.* a head for lambs, his Lordship considered to be clearly untenable; and that there was no colour for setting it up. Then as to the farm modus

modus of 19 *s.* there is certainly no evidence which goes to show that that payment was a modus, notwithstanding the length of time during which that sum had been paid, which has been, without doubt, very considerable. But the rector, it appears, lived out of the parish during the whole of his incumbency, which may go far to account for it; and the payments said to be made in lieu of hay, are (taken as moduses) most extraordinary; for it seems that in some way or other, every inch of land in the parish is covered by various moduses. The three first terriers, on the other hand, are quite conclusive. There the *tenths*, which is a very strong term, and well relied on by Mr. *Dauncey*, are said to be payable in kind. But not a word is mentioned of *moduses* in either of those ancient documents; and the other modern terriers, as they are called, made above 100 years afterwards, and by the parishioners themselves, amount to the most feeble attempt to establish a modus that ever was made, and ought not to be countenanced.

GRAHAM, *Baron*, for the same reasons, was of the like opinion.

WOOD, *Baron*, was also of opinion that all the moduses, except the farm modus, were void, for uncertainty in point of law and fact.

As to the farm modus, however, his Lordship expressed himself to be of opinion that there had been sufficient evidence of the age offered in sup-

1816.

MYTTON v. HARRIS.

port of it, although opposed by adverse documents, to call on the Court to send it to a jury.

In all cases (observed his Lordship) of usage, proved on one side and none on the other, I shall always hold that a jury ought to decide. As to the merits of this case, I am not at liberty, perhaps, to express my opinion; but with respect to the evidence of the terriers, I cannot consider them admissible evidence against the land-owners, unless proved to have been signed by some of the persons from whom they derive title. We should certainly not admit them as against a rector or vicar, unless they were signed by them, or some of their predecessors. Other parishioners having signed the terriers, do not carry them any farther as against the owner of the farm. As to such terriers as concern the parish generally, I agree that it would be sufficient if they should be signed by any of the parishioners; but their signing a terrier cannot make it admissible to affect a farm modus.

His Lordship said, on the subject of awarding an issue in this case, that the jurisdiction of Courts of Equity was only ancilliary and subsidiary to that of Courts of Common Law; and legal rights ought, if possible, to be established by legal means in the first instance;—that the nature of the examination of witnesses in Courts of Equity, through the medium of answers to interrogatories in writing, was a consideration which went to strengthen the necessity of the interference of a jury in doubtful points;

points; and as proof of it in this very case, the witness *(Davies,)* who appeared to have conducted himself in an extraordinary manner altogether, would cut an awkward figure in a witness-box, whatever he might have done on paper.

RICHARDS, *Baron*, was of opinion that *Davies*'s evidence could not be put out of this question; and that, on the whole, the testimony was conclusive and satisfactory, as it appeared to him. His Lordship said, he would always oppose sending issues to a jury where it could possibly be avoided, unless it were in the well-known excepted cases (of a rector and heir-at-law)*.

Account decreed, with Costs.

* The reasons given by those of their Lordships, who held that an issue ought not to go, the reporter has taken the liberty of omitting; for as that question seems to have been set at rest by the case of *Bullen* v. *Mitchell (a)*, where all the arguments are fully given, it has been thought unnecessary to repeat what is there so recently and fully discussed and settled.

It may not be superfluous to observe here, that before that decision, perhaps, the right of deciding without an issue, by the Equity side of *this Court*, in cases where either of their Lordships had entertained a difference of opinion, was not so completely established.

It is stated in all the cases, that the foundation of that right is, that the Court being *satisfied* with the evidence before it, does not therefore require the aid of a jury to assist its conscience. The distinction taken is, that in the leading case

(a) Ante, Vol. II. p. 399.

1816.

MYTTON v. HARRIS.

case of the Minor Canons of *St. Paul's* v. *Morris* (*b*), the Chancellor, as constituting himself *the Court*, expresses himself to have been satisfied with the evidence before him.—The *Exchequer* being composed of four Judges, a difference of opinion on the part of one of its members might have raised a question as to the Court being satisfied. That case, however, appears to have decided in effect, that the satisfaction of the *majority* is, in such cases, the satisfaction of *the Court*.

(*b*) Ante, Vol. II. p. 418.

---

1 Ph. 112

RIDLEY *v.* OBEE (by original Bill.)

12 Sim 567

TAYLOR and others *v.* OBEE (by Bill of Reviver.

OBEE *v.* TAYLOR and others (by cross Bill.)

1816.

Friday, 21st June.

The Court will not make an order on motion, that a plaintiff in a cross cause (who has not examined witnesses on his part in the original cause, after having obtained an order to enlarge publication) shall be at liberty to read depositions taken on his behalf in the cross cause, after publication of the depositions taken on the behalf of the plaintiff, on the hearing of the original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on the part of all parties interested, and their attornies, of the depositions published.

Nor will they depart from their *general* rule in that respect, however satisfactory in point of fact the affidavit in support of such a motion may be in the *particular* instance.

DAUNCEY and *Pepys* moved the Court*, pursuant to notice, that the last-mentioned cause might be

* This motion had been made before (on the first day of term); but the Court, on that occasion, refused to hear it, because there was no affidavit put in to satisfy the Court that the plaintiffs in the last cause had not in the mean time come to the knowledge of the evidence of the plaintiffs in the first causes; and, for what reason the witnesses had not been examined in the first causes.

be ordered to be put into the short paper of causes, to be heard at the same time with the two first mentioned causes: and that the depositions taken on the part of the plaintiff, in the last-mentioned cause, might be read as evidence, on his behalf, in the two first-mentioned causes.

The motion was supported by an affidavit, made by the Attornies and Clerk in Court, of the plaintiff in the last cause, stating, in substance, that (all the causes being at issue) they were advised, by Counsel, to move for liberty to read the proofs obtained in the cross cause, on the hearing of the original cause;—that publication passed in the original cause in the latter part of the preceding, or the early part of the present year; but that in pursuance of the same advice, the plaintiff, in the cross cause, had not, on that commission, examined witnesses on his part;—that on the messenger of the examiner, who examined the witnesses in the original cause, inquiring whether the deponents (the Solicitors of the defendants in the original causes) would take an office copy of the depositions so taken, deponents instantly attended at the King's Remembrancer's Office, and informed the examiner's clerk that they were then preparing to examine witnesses in the last-mentioned cause, on the part of the plaintiff therein; and they therefore required that the depositions, which had been already taken in the first-mentioned causes, might not be permitted to be seen, and that the contents might not be disclosed to any person on the part of the said plaintiff in the last cause *(Obee)*;—that none of deponents

1816.

RIDLEY and others v. OBEE and others, &c.

nents had seen or knew any thing of such depositions; and that, to the best of their knowledge, none of the witnesses examined in the last cause, on the part of the plaintiff therein, had seen or knew any thing of those depositions, excepting one, who had been also examined in the two former causes; and that there was no reason to believe that she had any knowledge of the depositions of either of the other witnesses;—and, finally, that they (the Solicitors for the plaintiff in the cross bill) had been served with a notice by the Solicitors for the defendant in the same cause; that they, as the Solicitors for the plaintiff in the original causes, intended to move the Court, "that the two first-mentioned "causes might be ordered to be put into the short "paper of causes, to be heard at the same time with "the last-mentioned cause; and that the depositions, "taken on the part of the plaintiff in the two first-"mentioned causes, might be read as evidence, on "their part as defendants, in the last-mentioned "cause *."

The motion was much pressed, on the ground that the causes were substantially one and the same, and that the question was precisely the same in both; that there had been no delay, nor had any other improper motive actuated the plaintiff in the cross cause, in not having examined the same witnesses in the original cause; on the contrary, he had acted under the advice of counsel, in so abstaining; that, on the one hand, the order sought could not

* That notice was afterwards withdrawn.

unduly

unduly affect the other party on the merits, while on the other, complete justice could not now be done to the applicant without it; that it was conformable to the constant practice of Courts of Equity, to read depositions taken in a cross suit, on the hearing of an original cause between the same parties, where the subject matter was substantially the same; and that that practice had been recognized by the other party themselves, who had also given a notice in effect precisely the same.

MARTIN and RICHARDS, *contrà*, submitted, that if the party moving had any thing of which to complain, it was his own fault; and he had brought it on himself, by having neglected to examine his witnesses, if he had any at the proper period, in the course of the original cause. The dates of the proceedings show it to be so. The original bill was filed in *Michaelmas* Term 1809, and was answered in *January* 1810. On the death of the then plaintiff, the suit was revived by her executors, as of *Hilary* 1810; that bill was answered in *July* following, to which the plaintiffs filed a replication. In *Trinity* Term 1810, the defendant filed a cross bill, which was answered in *April* 1811. The cause being afterwards at issue, and witnesses having been examined on the part of the plaintiff, publication would have passed by order, on the first day of *Hilary* Term 1813, but that the defendant had, from time to time, obtained orders to enlarge publication till the first day of last *Easter* Term, alleging continually that they had material witnesses to examine; so that they might have

1816.

RIDLEY and others v. OBEE and others. &c.

have examined their witnesses if they had had any, but did not. There is, notwithstanding, no attempt made to account for all the intermediate neglect and delay on their part; and, therefore, they ought not now to have the extraordinary indulgence of the Court, which they seek, in permitting depositions to be read after publication of the evidence taken on the part of the plaintiffs, contrary to the rules of the Court; for though it is sworn that none of the persons engaged in conducting the defendant's cause, have obtained any knowledge of those depositions so published on the part of the plaintiff, it does not appear that the witnesses examined by them in the last cause, did not know of them.

THOMSON, *Chief Baron.* The depositions now sought to be read, must of course have been published; and the present application requires of the Court to give validity to an act already done; whereas the proper course would have been, (and it is the usual one in all cases of requiring indulgence) to apply for leave to do the act, with a view to the ultimate purposes of it. This might have been a more proper application, if it had been made with a general saving of all objections till the hearing, for that would have given the Court an opportunity of then saying, whether the depositions ought to be admitted to be read or not.

If we were to grant this application as now made, we should be departing from all our rules, and getting into a sea of confusion. We should be inducing all sorts of irregularities.

GRAHAM,

1816.

RIDLEY and others v. OBEE and others. &c.

GRAHAM, *Baron*, of the same opinion. The affidavit on which the Court might be induced to grant such an application, ought to be very strong; and certainly there have not been sufficient grounds laid before the Court on the present occasion.

RICHARDS, *Baron*. Rules which are made to guard against confusion and inconvenience, ought to be strictly observed. It might not, perhaps, be mischievous in one particular instance; but that would become a precedent for dispensing with the rule in many others, wherein it might be so.

Motion refused *.

* The facts and merits of this case are detailed, in the cause entitled "*Taylor* and others *v. Obee*," post, p. 83.

1816.

Friday, 21st June.

BRABAND *v.* HOSKINS and others.—(Demurrer.)

Where the object of a bill *quia timet* is to prevent the assignees of a bankrupt, purchaser of an estate, from bringing an action to recover back that part of the consideration-money remaining due to the vendor which had been paid to him subsequent to the commission of the act of bankruptcy, on the ground of his having waved his equitable lien by taking a bond for the purchase-money, if the bill charge as a fact that the bond was given *as a further additional or collateral security*, the question of law cannot be raised on a general demurrer, because that fact must necessarily be admitted.

THE plaintiff filed the present bill to restrain the defendants from proceeding at law against him; stating that he had entered into an agreement with *Joseph Dicken*, for the absolute sale of an estate, in the county of *Derby*, for the sum of 5,250*l.*; by which it was agreed that *Dicken* should be allowed time for payment of the sum of 4,000*l.* part of the purchase-

1816.

BRABAND v. HOSKINS and others.

purchase-money, and should, *for further securing the payment thereof*, procure *Richard Meek* to join with him in a joint and several bond, in the penal sum of 8,000*l.* That the contract was afterwards carried into execution. That in 1810, *Dicken* and *Meek*, who were both engaged in trade, became embarrassed in circumstances, when *Dicken* executed a conveyance of the estate to trustees, in trust, to sell for the benefit of his creditors, which was accordingly sold, and produced a much greater sum than the original purchase-money, which was received by the trustees; that (the sum of 800*l.* remaining due to the plaintiff, on the bond, and an arrear of interest, making, together, 913*l.*,) the trustees paid him that sum in the month of *July* 1814, when he delivered up the bond to be cancelled, and executed a general release; that *Dicken* becoming insolvent, he was declared a bankrupt, under a commission dated 15th *November* following, and the defendants were appointed assignees of his estate. The bill then charged that defendants, in *December* following, demanded of the plaintiff that he should repay the said sum of 913*l.*; and that they had threatened to commence an action, in case of his refusal to do so, on pretence that as previous to the payment to him of that money, *Dicken* had committed some act of bankruptcy, such payment was therefore void; whereas the plaintiff insisted that if that were so, he had a lien in equity on the estate, and the purchase-money produced by the re-sale for so much of the original purchase-money as remained due at that time; and that he had not waved or relinquished that lien by taking the

the said bond, as that was taken by him *as a farther additional or collateral security.*

To this bill, the defendant demurred.

Whetherell and *Wingfield*, in support of the demurrer, submitted that the acceptance of the bond, more especially as it was the joint and several bond of the vendee, and a third person, had destroyed the plaintiff's original right of an equitable lien on the estate and purchase-money. The case of *Fawell* v. *Heelis (a)*, establishes the point, that if a vendor parts with his estate, and takes a security for the consideration-money, a court of equity will not assist him against the creditors of the purchaser. That case has never been over-ruled, whatever traditional doubts may be said to have been thrown on it by the dictum in the case of *Blackburn* v. *Gregson (b)*. If the plaintiff had filed a bill against the assignees of the purchaser, he could not compel them to pay the money. The security which he has accepted, is a specialty of the highest nature, and binding land. The circumstance of his having taken the precaution to get the additional security of a surety, is a strong fact in proof of an abandonment of his equitable lien, and is *quasi evidentia rei*. Here, therefore, the vendor does not trust to the personal security of the vendee, and, as was said by the Master of the Rolls, in the case of *Nairn* v. *Prowse (c)*, without entering into the general

(a) Ambler, 726. (b) 1 Br. Ch. C. 423.
(c) 6 Ves. 760.

 question,

1816.

BRABANT v. HOSKINS and others.

question, whither every security taken, necessarily amounts to a waiver of the lien of the vendor; in this case, the vendor has extinguished his equitable lien, by taking such a security as the present bond.

Roupell, in support of the bill, submitted, that the previous question, arising in the present case, was, whether, as this was a bill in fact *quia timet*, and the demurrer general, which therefore necessarily admitted all the facts, the plaintiff was not precluded, by the bill having charged that the security given was only taken as a further additional or collateral security; and if so, by the express agreement of the parties, the vendor's equitable lien was to remain, notwithstanding the security of the bond. That statement in the bill is positive, and the defendants cannot, on general demurrer, raise a question on it.

THOMSON, *Chief Baron*. If that be so, there is certainly an end of the demurrer; for that fact being admitted, the plaintiff has clearly no Equity which can entitle him to the interference of the Court in his favour.

It was then urged, that the statement in the bill of that fact, ought not to be taken as a positive allegation, but as matter of inference, from which the parties themselves were not at liberty to make any conclusive deduction.

Per Curiam. It is stated as a fact, and it is sufficient, therefore, to induce us to over-rule the

demurrer. If it be not the truth, it must be decided in a more solemn manner.

1816.

BRABANT v. HOSKINS and others.

Demurrer over-ruled.

Regula Generalis.

Saturday, 22d June.

JUSTIFICATION of bail, *by affidavit*, is not within the rule of *Easter* Term, 56 *Geo.* III.*

Bail by affidavit not within the rule E. 56 Geo. 3.

* Vide ante, Vol. II. page 327.

1816.

ATTORNEY GENERAL *v.* HUGHES.

Saturday, 22d June.

PELL, Serjeant, moved to put off the trial of this information, after a peremptory undertaking.

If the trial of an information has been once postponed at the instance of the Attorney-General *pro defectu juratorum*, the Court will also grant the defendant a rule to show cause why the trial should not be further postponed, on his application, if in the mean time a material witness, deposed to have been ready on the former occasion, is not forthcoming.

He admitted, that the Court would expect an urgent affidavit. That, on which the present application was founded, stated, that a material witness for the defendant was absent; and that that circumstance was not known to the defendant when the undertaking was given.

It was also stated, that at the time when the cause was to have come on, the defendant was ready to go to trial with the witness, who was now deposed

1816.

ATTORNEY GENERAL v. HUGHES.

to be absent; but that on that occasion, the trial was postponed *pro defectu juratorum*, at the instance of the Attorney General.

Under these circumstances, the Court granted the rule.

1816.

Friday, 21st June.

——— *v.* ———

In an action against a sheriff, for not assigning a he bail bond, tot Court will n grant a motion to enter the recognizance of bail on the record as taken on the true day (it being always entered generally as of the term) to enable the plaintiff to proceed with his action.

Quere, if such an action be maintainable?

IN this action, which had been brought against a sheriff *for not assigning a bail bond, Owen* moved, that the recognizance of bail might be entered on the record, as having been taken on the 7th of *May*, agreeably with the fact, that the plaintiff might be enabled to maintain his action, which he could not otherwise do, the entry of bail relating generally to the term; but the Court of Common Pleas had permitted the record to be altered to accord with the fact, on a similar application in the case of *Austin* and others, assignees of the Sheriff of *Middlesex* v. *Fenton (a)*.

The Court refused the rule, intimating, that the cause of action was at least very novel, if it could be maintained; and that the plaintiff should have proceeded against the sheriff by attachment in the usual and regular way.

(a) 1 Taunt. 23.

It

1816.

It was then stated, that bail had subsequently been put in and justified, but irregularly.

Per Curiam.—You should have opposed the justification on that ground at the time.

Rule refused.

SAME CAUSE.

Saturday, 22d June.

OWEN now moved that the justification of the bail, which had been admitted in this cause, might be *set aside for irregularity.*

All motions to annul proceedings on the ground of irregularity must be made in the Term when the proceeding was had, or the Court will not receive the application.

But it appearing that the justification had been taken in Court last term, the Court said that that was an insuperable difficulty; for the rule was, that all motions to annul proceedings on the ground of irregularity, should be made the same term with the proceeding complained of, and that that rule could not be broken in upon in any case. They therefore refused to hear the merits of the motion.

1816.

Saturday, 22d June.

REX (in aid of HORN) *v.* RIPPON and others, (Assignees of *Watt.*)

After the defendant has obtained time to plead to an Extent, he cannot take any objection to the affidavit on which it is founded by motion.

THE Solicitor General being present on the part of the Crown,

Dauncey and *Walton* now showed cause against this rule, which had been obtained last term *, for setting aside this Extent †, on an objection to the sufficiency of the affidavit on which it was founded. They objected that the defendants having (on the expiration of the rule to plead, and being called on to plead peremptorily) obtained an order for six weeks time, were thereby precluded from any advantage which the alleged defect in the affidavit might otherwise have afforded them. Had not the present motion been pending, (the further time allowed for pleading having expired,) the defendants would have been in contempt for want of a plea.

The proper course is to crave oyer and demur.

Carr and *West* submitted that the present objection being that of a substantial and fatal error

* On the first day of last *Easter* Term the defendants obtained a rule to set aside the *venditioni exponas*, which had been sued out in this Extent, in default of claim, within the time allowed by the rule, and being permitted to enter their claim, on showing by affidavit that the claim had been omitted to be entered, by a mistake of their clerk in court, which was afterwards made absolute.

† Vide Vol. II. p. 398.

in

1816.

REX (in aid of HORN) v. RIPPON and others.

in the affidavit, on which the whole proceedings were founded, they were not precluded in any stage of the cause from taking it. It is one which might be taken even after verdict, in arrest of judgment.

The Court inquired why the objection had not been raised by demurrer, on oyer.

It was said that, according to what was understood to be the practice on this side of the Court, it was not allowable to demur after time taken to plead*.

On the other side it was insisted, that there was no precedent in the practice of any Court of an attempt to set aside process, being permitted, after a defendant had submitted to require time to plead.

Per Curiam.—It is certainly too late now to object, in this way, by motion, to the affidavit on which this Extent has proceeded. The proper course of bringing the question before the Court, is by demurrer.

Rule discharged.

* The Court expressed doubts of there being any such practice.

1816.
Saturday, 22d June.

The KING (in aid of SIMPSON and others) *v.* HOPPER and others, (Assignees of MOWBRAY.)

On an Extent in aid (or even on an immediate Extent) where goods and chattels of the debtor have been seized to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the Crown, the debtor's lands cannot be sold.

A RULE was granted on the 15th instant, on the motion of *West*, calling on the prosecutors of this Extent, to show cause why, upon payment into Court, or the receipt of the Exchequer to the account of the Receiver General of taxes for the North Riding of *York*, the sum of 4,256*l.* 7*s.* 9*d.* the amount of the debt for which the Extent issued, an *amoveas manus* should not issue to remove the king's hands from the lands, tenements, effects, and property of the bankrupts, which had been seized by the sheriff of *Durham*, under the writ.

Under such circumstances the Court will, on motion, grant an *amoveas manus* (by an order to show cause) on the defendants paying into the receipt of the Exchequer the debt *without the costs*.

Simpson and his partners, who were bankers, were found indebted to the Crown in the sum of 10,000*l.* for money received by *Simpson*, for assessed taxes, as deputy to the Receiver General of the North Riding, and by him paid into the house of himself and partners; *Mowbray* & Co. were also found indebted to them in the sum of 4,256*l.* 7*s.* 9*d.* for money lent.

Costs are not recoverable where goods and lands are seized, the goods alone being more than sufficient to pay the debt levied, not even in the case of an immediate Extent. The stat. 25 Geo. III. c. 35, held not to give the Crown a right to costs, in cases where it is not necessary to resort to a sale of the lands.

The sheriff, according to the exigency of the writ, had seized certain freehold and leasehold

Quere, whether in the case of lands being actually sold under an Extent *in aid*, the prosecutor would be entitled to costs?

estates,

estates, the property of the several defendants, to a large amount, *and also goods and chattels*, which were appraised by the jury at the sum of 8,000*l.*

Under these circumstances, *West* moved for the above rule, which was granted; and now

Dauncey and *Nolan* showed cause. They objected, that it had not been made part of the order, that the money should be paid into Court *with costs*. They admitted, that in cases of goods and chattels seized, the Crown was not entitled to levy costs; but that, in point of fact, in the present instance, the defendant's lands had been seized under this Extent; and in cases were lands are seized, the Crown is entitled, by the 25th *Geo.* III. ch. 35, to have the costs which have been incurred in enforcing the payment of the debt. The words of the statute are,—"And all monies which shall become payable "from such purchaser or purchasers as aforesaid, "shall be paid, accounted for, and applied towards "discharge of the debt due to the Crown, and of "all costs and expenses which shall be incurred "by the Crown, in enforcing the payment of such "debt, in such manner as the said Court of Ex-"chequer shall from time to time order and ap-"point." Then there is a provision for paying the surplus, if there should be any, "after payment "of the whole debt to the Crown, and of all costs "and expenses incurred in enforcing the payment "thereof," to the persons who would be entitled in case there had been no sale,—the statute obviously contemplating throughout the payment of costs,

1816.

The KING (in aid of SIMPSON and others) v. HOPPER and others.

costs, in case of a seizure. The Act has certainly not provided expressly for the case of a redemption of the lands, by the debtor paying the money due to the Crown, under the authority of this Court; but from the object and policy of it, it may be assumed that in that case the expenses of the seizure must be paid. It can hardly be intended to be urged that the costs are only to be paid in the event of an actual sale; for that would be to oblige the Crown to resist any accommodation to the defendant, who, to save the expense of proceeding to extremity, should wish to recover his lands in an easier and earlier manner; or it would go to make the Crown a loser by its own lenity. The Court will not be disposed to sanction a proceeding which shall go to place the Crown in a worse situation, by receiving the money before a sale of the lands should be ordered, than it would be after judgment had been recovered, and the lands sold, when *all* the costs would be to be deducted out of the produce. If the lands are to be restored on payment of the debt, it will be tantamount to a sale of the lands for that purpose; and therefore the prosecutors of the Extent ought to have all the advantages which they would have been entitled to on such sale: it is by having seized the lands that they have enforced the payment of the debt, for the goods and chattels which have been seized, may be liable to paramount claims.

It will, perhaps, be argued, that this being the case of an Extent *in aid*, the Crown cannot sell the lands. But the prosecutor of an Extent having once

once employed the prerogative process, has a right to all its incidental privileges; one of which is, that under it the lands of the debtor may be seized and sold to pay the debt. It also appears by the inquisition, that although this is in form an Extent in aid, it has been issued for the recovery of the Crown's proper money. It is in aid of the Deputy Receiver General, for the amount of assessed taxes actually received by him, and lent to the defendants, and is therefore equivalent to an immediate Extent.

On the whole, this case resolves itself into two questions:

First, Whether the lands of a debtor to the Crown's debtor *can be sold under this Extent in Aid:*

Secondly, Whether, if they can be sold, the defendants may, before the order for sale, obtain an *amoveas manus*, by paying the Crown's debt into Court, *without the Crown's costs of enforcing the payment.*

West, in support of the order, submitted, that the prosecutors of this Extent would not have been entitled to costs, even after they should have obtained judgment; for, as this was merely the case of an Extent in aid, the statute of 35 *Geo.* III. did not empower them to sell the debtor's lands. That statute was merely remedial of the 13 *Eliz.* ch. 4, and was passed to facilitate the sale of the lands

1816.

The KING (in aid of SIMPSON and others) v. HOPPER and others.

lands of the debtor *to the Crown*, by a more expeditious and summary mode of proceeding, leaving the law as before; and did not, in any respect, extend the power to sell the debtor's lands to persons not having such power under that statute. The Crown, therefore, *alone* can sell the lands, and that only for *the Crown's immediate debt.* In this case, the debt of the person whose lands are seized, is not *due to the Crown*, nor has *the Crown* incurred any costs or expenses in *enforcing the payment of it.* There is no privity between the Crown, and the debtor whose lands are seized. If, therefore, these lands should be actually sold, the prosecutors of the Extent would not be entitled to their costs.

Another objection is, that in this case, as appears by the appraisement, the goods and chattels which have been seized, amount in value to more than sufficient to pay the Crown's debt, without having recourse to the debtor's lands. Therefore the Court will not, in conformity with the fundamental principle of the law, that goods are to be preferred in execution to lands, permit a sale of the lands, where the debt can be satisfied out of the goods. That general principle is recognized in the common case of execution by *elegit*, whereby the defendant's lands are never touched but where a sufficient levy cannot be made on his personal goods, to satisfy the plaintiff's debt and costs. In 2d Inst. p. 395, Lord Coke says,—"If the chattels be sufficient to "pay the debt, and so may appear to the sheriff, "whereby he may satisfy the debt, then he ought "not to extend the lands for the residue; and

"all

1816.

The KING (in aid of SIMPSON and others) v. HOPPER and others.

"all this appeareth by the writ of *elegit*, framed "upon this act." That principle, until the stat. 33d *H.* VIII. extended to the Crown's execution, and was founded on *Magna Charta*, 2 Inst. p. 19; and there is no reason for an opinion, that since the 33d *H.* VIII. which gives the Crown the power to seize its debtor's lands, that the Court would order them to be sold, where the defendant's goods and chattels had also been seized to an amount more than sufficient to satisfy the debt. There is good reason why the Crown should not wish in such a case to take its debtor's land, where his goods were sufficient; for as it could only take the growing profits by *levari facias*, so dilatory a mode would obviously be postponed to the more summary proceeding of a *venditioni exponas* against the goods.

The statute of 25 *Geo.* III. does not give the Crown a right of election to proceed against either goods or lands, as it shall think fit; but, on the contrary, by the mode prescribed for proceeding against the lands at all, it has given this Court a discretionary controul in such cases, probably in contemplation of the very principle now contended for, of postponing lands to goods, in the execution of judgment. Were it, indeed, left in the discretion of the Crown, it would now, (since the statute has given costs in cases of levies, by sale of land,) on all occasions resort, as matter of course, to the lands in the first instance, for the sake of getting the costs and expenses, which it could not levy where goods alone are seized. But that would be adverse

1816.

The KING (in aid of SIMPSON and others) v. HOPPER and others.

adverse to the policy of the established and ancient maxim of the law, that where the debtor has sufficient goods wherewith to satisfy the judgment, the lands shall not be levied on.

The act of parliament having given the Court a discretion, with respect to the order for the sale of a debtor's lands, by requiring an application to be made to the Court, by the Attorney General, for that purpose; the question now is, Whether, in the exercise of that discretion, they will not, under those circumstances, make the present rule absolute?

THOMSON, *Chief Baron.* It appears by the inquisition*, certainly, that goods and chattels to a much greater amount than sufficient to pay the debt due to the Crown, and which is now proposed to be paid into Court, have been seized under this Extent. It is clear, therefore, that, in this case, the Crown itself would not have been entitled to resort to the lands under an immediate Extent. And on the return of the inquisition, we should

* The finding of the Jury, on that part of the inquisition, was as follows:

"And the jurors aforesaid, upon their oaths aforesaid, further say, that the said *Arthur Mowbray* (and the rest of the bankrupts) were, on the said 22d of *July* last, possessed, as of their own proper goods and chattels, of and in the several goods and chattels mentioned and described in the schedule thereto annexed, marked R, which the said jurors did appraise and value at the sum of 8,000*l.*"

not

1816.

The KING (in aid of SIMPSON and others) v. HOPPER and others.

not have ordered a sale of the lands which have been seized, if an application had been made to us for such an order; for our first inquiry would have been, Whether the goods, which had been seized, were sufficient to satisfy the debt? and unless they proved insufficient, we should not order a sale which would not otherwise be necessary; so that the Crown would not be entitled to costs in the present case.

It becomes, therefore, unnecessary to give any opinion on the other questions which have been raised.

GRAHAM, *Baron.* I shall adopt the same proper reserve as my Lord Chief Baron in giving any opinion on the general rule, as to the right to costs on the sale of lands; for, in this case, that is put out of the question, by there having been goods and chattels levied to a sufficient amount to satisfy the debt; and no doubt the Court would observe the rule, that the goods seized must be shown to be inadequate to the discharge of the debt, before they would grant an order for the sale of the debtor's lands, on a motion to that effect by the Attorney General.

WOOD and RICHARDS, *Barons*, of the same opinion.

Order made absolute.

IN THE EXCHEQUER CHAMBER.

1816.

Thursday, 27th June.

BEATSON and others *v.* RUSHFORTH—(In Error.)

It is not ground of error that the plaintiff (in an action against a hundred, on the 41st Geo. III. c. 24, and 1st Geo. I. c. 5, for recovery of damages for injury done to him by the demolition of his mills by persons riotously assembled) do not allege in his declaration that such demolition was *felonious*, or that the persons riotously assembled acted *feloniously*.

It is sufficient to sanction a civil action, if it appear from the allegation of the acts done that a felony had been committed by them.

THE question raised by the present writ of error from this Court was, Whether, in an action founded on the 41st *Geo.* III. ch. 24, for the recovery of damages sustained by the riotous demolition of mills, it was necessary to lay the injurious act as having been done "feloniously?"

The defendant had obtained a verdict at the *York Lent* Assizes 1815, against the plaintiffs, four of the inhabitants of the hundred of *Agbrigg* and *Morley*, in that county*. The three first counts of the declaration stated, That on the 24th of *April* 1812, at the parish of *Halifax*, in the hundred and county aforesaid, divers persons, to the number of twelve and more, being then and there unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, did, unlawfully, tumultuously, and with force, demolish, in part, a certain water-mill of the plaintiff, being in the parish aforesaid, in the hundred of the county aforesaid, and the walls, doors, windows, window frames, locks and hasps affixed and belonging thereto; and part of the said water-mill of the said plaintiff, and certain

* Vide ante, Vol. I. p. 343.

works;

works; to wit, certain shears, frames, machines and straps belonging thereto, in contempt of our lord the King, to the damage of the plaintiff of 500*l.* and against the form of the statute, &c.; whereby, and by force of the statutes in such case made and provided, an action hath accrued to the plaintiff, being the person injured and damnified thereby, to recover against the defendant, being then and still inhabitants of the said hundred, the damage so by him sustained, by demolishing, in part, the said water-mill, and the works thereto belonging. There were several other counts, to all of which the defendant pleaded the general issue.

The error assigned was, that it was not alleged in either of the counts, that the persons mentioned to have been unlawfully, riotously, and tumultuously assembled, did *feloniously* demolish, in any part, the said premises; nor that they committed any *felonious* act or offence in respect thereof. The case now came on for argument before Lord *Ellenborough*, and Lord Chief Justice *Gibbs*;

Scarlett, for the plaintiff in error, stated the sole point to be, Whether the omission of the word *feloniously*, in the several counts of the declaration, were fatal or not? He contended that it was; for by the rules of pleading, it is necessary that there should be allegations of whatever is required to be proved; as, therefore, it was decided in the case of *Reid* v. *Clarke* (*a*), that the hundred were not

(*a*) 7 T. R. 496.

1816.

BEATSON and others v. RUSHWORTH.

liable in an action on stat. 1 *Geo.* I. st. 2. ch. 5, (on which two of the counts in this declaration are founded) unless the riot amounted to felony within that statute: so it is necessary that it should be alleged, that the act for the consequences of which the person suing seeks compensation in damages was felonious. Lord *Kenyon* distinctly says, in giving judgment:—"I cannot agree that the hundred are answerable for damages done by persons "who are not guilty of felony within the former "part of the act." If the commission of a felony were necessary to support the action, the declaration is bad, if it omit the word feloniously; for a felony must be proved, and to be proved, it must be alleged.

Littlerdale was to have argued in support of the judgment; but their Lordships dispensed with hearing him, because they said,

They were clearly of opinion, that although it were certainly necessary to the support of the action which had been brought, that there should be such proof adduced as would be sufficient to establish a charge of felony on an indictment, it was, however, not necessary to *aver*, in the civil suit, that the persons assembled acted feloniously, or committed a felony: it was sufficient to state, that they committed the acts charged in the words of the statute, as had been done in this case.—In the case of the *King* v. *Judd* (*b*), it was held not to be

(*b*) 2 Term. Rep. 255.

necessary

necessary to state in a warrant of commitment, on a charge of felony, that the act was done feloniously; and that it would be sufficient if, on the facts stated, it appeared that a felony had been committed: that did not appear on the facts stated in that case, and therefore the Court held that they were bound to bail the defendant on that ground. In the present case, however, it appears clearly, from the acts stated in the declaration, that a felony had been committed, and that is quite sufficient to support the action against the defendant below.

Judgment affirmed.

Scarlett afterwards admitted, that in the extract given of the declaration in the report of *Hyde* v. *Cogan* (c), (where the Court gave judgment for the plaintiff, on a special verdict found in that case, which was also an action against a hundred, for damages, by rioters in part demolishing a dwelling house, and destroying goods and furniture therein,) the act of demolishing was not laid to have been done feloniously.

(c) Doug. 699.

1816.

Saturday, 29th June.

SEARLE, Assignee of the Sheriff of *London*, *v.* HALE and others.

The Court will stay proceedings on an assignment of a bail bond, the defendant having since perfected bail on motion, without tender of payment of costs, or any affidavit of merits, or that the application is made in ease of the sheriff or bail, where a trial has not been lost:—nor will they in such case order the bail bond to stand as a security: requiring only that the plaintiff shall be put in the same situation as if bail had been put in in time, and duly perfected.

A RULE had been obtained by *Richards*, on the part of the defendant, for staying the proceedings on the bail bond assigned, in this cause; the defendant having put in and perfected bail; against which,

Owen now showed cause, submitting that the rule obtained could not be supported; and taking two objections:—first, that there had been no affidavit of merits filed—or that the application was made in ease of the sheriff, without collusion with, or indemnity from, the defendant, as had been held to be necessary by the Court of King's Bench, in the case of the *King* v. the Sheriff of *Middlesex (a)*, (whereas in this case the motion is expressly made on behalf of the defendant;) and, secondly, that the motion was not originally made on terms of payment of costs, as it ought to have been, where the assignment and proceedings were regular, and the applicant sought an indulgence.—This (it was put) was a cause where a trial had been lost, the plaintiff having declared *de bene esse*—and therefore, if the rule should be made absolute, the bail-bond ought to be ordered to stand as a security*.

(a) 3 M. & Sel. 299.

* Tidd's Practice, p. 296; but see a distinction noticed there in the practice of the Common Pleas.

Dauncey,

1816.

SEARLE (Assignee of the Sheriff of London) v. HALE and others.

Dauncey, in support of the rule, contended, that as the plaintiff had not lost a trial, as would appear from the dates of the proceedings*, the rule ought to be made absolute, on the common terms, without requiring the bond to stand as a security. The assignment of the bail-bond was taken on the 24th, and on the 25th the bail justified.—The case cited, was that of setting aside an attachment for not bringing in the body.—This is merely the case of an assignee of the sheriff suing on the bond given by the principal and bail below.

Per Curiam.—The defendant must undertake to put the plaintiff in the same situation as he would have been in if the bail had justified in due time. On those terms we will make the

Rule absolute, on payment of costs.

* The writ was returnable on the first return of this term (10th *June*). The defendant had four days inclusive, after the *quarto die post*, to put in bail, which would be till the 17th: on that day bail was put in. On the 18th the bail were excepted against. On the 19th, notice of justification was given for the 21st; but the bail did not attend. The defendant, however, (it was said) had still the whole of the 22d to justify; and if the bail had then justified, the plaintiff might have demanded a plea in the evening; but that day being *Saturday*, the defendant would have had the whole of *Monday*, the 24th, to plead, and therefore the plaintiff could not have delivered his issue till the morning of the 25th, when it would have been too late to have given the necessary notice (eight days) of trial for the sittings in Term, which are always in this Court the day before the last day of Term.—Another circumstance stated was, that the 24th (Monday) being a *dies non* as to Common Law proceedings in this Court, the defendant had all the 25th to plead in—*quere*.

1816.

Saturday, 29th June.

GILBERT *v.* STANISLAUS.

In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that defendant represented the returns to [*Wednesday, 1st May.*] amount to a sum certain is material, and must be precisely proved, notwithstanding it be laid under a *videlicet*. And a variance between the allegation and proof is a good ground of nonsuit after verdict.

In cases of doubt, there should be separate counts to let in proof of the precise fact.

THE plaintiff having purchased the defendant's house, and business of a milliner and lace dealer, for the sum of 1,680 *l.* brought the present action of deceit for an alleged misrepresentation of the annual returns of the trade, and recovered a verdict on the trial, before Mr. Baron *Richards*, at *Westminster*, at the Sittings after *Hilary* Term.

Dauncey and *Gaselee* now obtained a rule to show cause why that verdict should not be set aside, and a non-suit entered; for that the proof offered did not support the allegation in the counts.

The declaration stated, that "upon the treaty "for the purchase of the lease, trade, &c. and "before the making the said agreement, and as "inducement to the plaintiff to enter into and "make such agreement, the defendant falsely, and "deceitfully, represented and asserted to the plaintiff, that the annual returns of his aforesaid "trades or businesses of a milliner, &c. *amounted* "*to a large sum*; *to wit, the sum of* 6,000 *l.*— "And thereby, and by no other means whatever, "he, the plaintiff, was induced, and moved, to "enter into, and make, and did accordingly enter "into and make the agreement aforesaid; whereas, "in truth and in fact, the annual returns of said

1816.

GILBERT v. STANISLAUS.

"trades and businesses, at the time of making said "representation and assertion of the defendant, did "not amount to, nor had they, during any year pre- "vious thereto, amounted to, nor had they in any "year since that time, amounted to, the last-men- "tioned sum of money, nor to any other sum near "to that amount; but, on the contrary thereof, to "a much smaller sum of money, to wit, a sum not "exceeding 3,000 *l.*; by means, &c."

The witnesses proved no more than that the defendant had represented that the returns of his trades amounted to between 5 and 6,000 *l.*, or 6 and 7,000 *l.*

The defendant's counsel insisted that, to support the present case, which is in the nature of an action on a warranty, the plaintiff was strictly bound to prove that the defendant represented the amount of the returns to be precisely 6,000 *l.*

Tuesday, 18th June.

Scarlett and *Denman* now showed cause. They contended that they were not bound by the sum stated in the declaration—that the substantial ground of the action was a false statement, on the part of the defendant, of the gross amount of the returns of the trade sold, whereby the plaintiff had been deceived, and induced to give a larger price for it than it was fairly worth—that the *videlicet* rendered the sum stated immaterial; and it was sufficient if the plaintiff proved that the defendant had represented the returns to amount to a large sum,

1816.

GILBERT v. STANISLAUS.

whereas, in fact, they were much less; and they submitted, that, if it were necessary to prove a precise sum in actions of this nature, a plaintiff could never, or seldom, succeed in obtaining redress for a similar imposition; for the false representation would never be capable of proof in terms; and this was not the case of a variance from the terms of a written contract, which would certainly be fatal.—That the whole of the present case amounted to this: the defendant represented his business as more profitable than it really was; and if that was substantially proved (as from the verdict it appears that in this case it was,) that is enough.

In reply, it was insisted that the sum was material; because it was necessary to state a sum certain, as the representation of the profits, in order to show the difference between the representation and the fact; and that being traversable, a difference in the allegation and the proof, was not aided by the *videlicet*; as a *videlicet* cannot make a material averment immaterial.—*Symons* v. *Knox* *(a)*, *Grimwood* v. *Barrit* *(b)*. If the representation had been laid in the alternative, that might have helped it, *Penny* v. *Porter* *(c)*; but here there is no such count.

With respect to the case being substantially proved in all actions of this sort, the Court expects

(a) 3 Term. Rep. 65. *(b)* 6 Ib. 460.
(c) 2 East, 2.

some

1806.

GILBERT v. STANISLAUS.

some actual fraud to be proved, otherwise the mere false representation amounts to nothing. It was so held by the Court of Common Pleas, in the case of *Pickering* v. *Dawson (d)*, where it was held to be necessary, besides the false representation, to show that, by some fraud on the part of the seller, the buyer was prevented from discovering the true state of things. And in a case in *Starkie's* N. P. Reports *(e)*, Lord *Ellenborough* expresses the same opinion.

Saturday, 29th June.

THOMSON, *Chief Baron.* In this case the averment in the declaration is certainly not proved. The allegation is, that the defendant represented the return of his trade as amounting, yearly, to the sum of 6,000 *l.*; whereas, in truth and in fact, they amounted to a much less sum, namely, under 3,000*l.* Now that must be taken to be an averment, that the defendant represented the profits of the trade as amounting to the sum of 6,000*l.* otherwise it would be nugatory, and there is no other sum mentioned. Then the last averment, that the profits, in point of fact, amounted to a much smaller sum (3,000*l.*), makes the first very material, and therefore, although it is laid under a *videlicet*, it must be taken to be a positive averment, that the annual returns, in fact, amounted to the precise sum of 6,000*l.*

(d) 4 Taunt. 779.

(e) *Dawes* v. *King*, Stark. N. P. 75.

Now,

1816.

GILBERT v. STANISLAUS.

Now, as it turns out on the trial, the evidence was nothing like it. The witness proved that they were said to amount to between 5 or 6,000*l.* or between 6 and 7,000*l.*

There could have been no difficulty in laying it according to the fact, and in the terms in which it was made, and then it would have been capable of distinct proof. And if there were any doubt, there might have been separate counts in the declaration. As it stands, there is no evidence to prove the allegation, and therefore there must be a non-suit on that ground.

Rule absolute.

1816.

Saturday, 29th June.

GRANT and others *v.* AUSTEN and others.

A general remittance to bankers, to whom the remitter is indebted, accompanied by a letter requesting them to pay certain specific sums to particular persons (not expressly out of the sum remitted) does not so fix the bankers as to give the persons, to whom such sums were so directed to be paid, a right of action against them for money had and received, without an assent on their part to such an appropriation of the money remitted.

It is not necessary that the bankers should express a dissent from the required appropriation.

An order for delivering particulars of a plaintiff's demand will not be made, if the defendant refuse to swear that he does not know the precise amount of the plaintiff's claim.—See the note in page 60.

THE plaintiffs, who were bankers at *Portsmouth*, brought the present action for money had and received, against the defendants, bankers, in *London*, to recover the sum of 59*l.* 15*s.* under the following circumstances:—

On

1816.

GRANT and others v. AUSTEN and others.

On the 12th of *November* 1813, the plaintiffs received a check from Messrs. *Baverstock* and Son, brewers at *Alton*, on Mr. *Gray*, their banker there, for the sum in question, which they forwarded to him on the same day, with a request, in the usual course, to pay the amount to the house of Messrs. *Ladbroke* and Co. bankers, in *London*. *Gray*, on the 16th of *November*, made a large remittance, in cash, notes, and short bills, to the defendants, who were his agents in *London*; accompanied by a letter, containing directions to pay certain sums of money on his account, which were, in the whole, very considerably short of the remittance sent, leaving a balance in reduction of *Gray*'s general account. That part of *Gray*'s letter which related to this sum, was in these words:—"I shall "be obliged by your paying Messrs. *Glynn* and "Co. 55*l.* on account of Messrs. *Wickham* and "Co. *Winchester*, and *to Messrs. Ladbroke* "*and Co.* 59*l.* 15*s. on account of Messrs. Grant* "*and Binbey, Portsmouth.*"

Under the impression that the defendants had observed his directions, *Gray* credited them with that sum, as having been so paid on his account. The defendants made no communication to *Gray*, in answer to that letter, until the 25th *November*. On that day, *Maunde* and *Tilson*, two of the defendants, came to *Alton*, and then informed him, that unless he furnished them with 1,700*l.* or 2,000*l.* they could not pay his orders, but not particularly specifying them. On the 28th, *Gray* stopped payment, in consequence of the defendant's refusal

1816.

GRANT and others v. AUSTEN and others.

refusal to pay his notes, and soon afterwards became bankrupt. In *December*, the plaintiffs wrote to defendants, stating the circumstances, and requesting payment of the money, which they answered by a refusal, giving as a reason, that they had not, at the time of the order alluded to, nor since, any money in their hands.

It appeared that *Gray* had considerably overdrawn on *Austen* and Co. and was, therefore, at that time, much indebted to them.

The plaintiffs then brought the present action, to which the defendants pleaded the general issue *. The cause was tried at *Winchester*, before Mr. Baron *Graham*, at the *Lent* Assizes for *Hants*, 1816, when the plaintiffs obtained a verdict, the Judge giving the defendants liberty to move to enter a nonsuit.

Saturday, 4th May.

Gifford obtained a rule to show cause why the verdict should not be set aside, and a nonsuit entered: submitting, that under the circumstances of this case, (the facts of which had been agreed on at the trial, by counsel on both sides, to be as stated

* The defendants, during the proceedings, took out a summons for particulars of the plaintiff's demand; but the Judge refused to make the order, because the defendants would not swear that they did not know the precise claim.

They also obtained an order *nisi* for changing the *venue* to *Westminster*, which was discharged on the plaintiffs undertaking to give material evidence in *Hampshire*.

above,)

above,) the defendants could not be considered liable at law, to the plaintiffs' demand, without some evidence to show that they had assented to adopt *Gray's* order to pay the money to *Ladbroke* and Co.

1816.

GRANT and others v. AUSTEN and others.

In the case of *Williams* v. *Everett* and others *(a)*, Lord *Ellenborough* (having nonsuited the plaintiffs on the trial of the cause at *Nisi Prius)*, held that bills or money so remitted, "continued to be the property of the remitter, and "to be held for his use (by the banker) until by "some engagement entered into by themselves, "with the person who is the object of the remit-"tance, they have precluded themselves from so "doing, and have appropriated the remittance to "the use of such person." In this case, there was no such engagement, appropriating the remittance specifically to the use of the plaintiffs; and therefore there was not that privity between them and the defendants which gave them a right to proceed in the action which they had brought.

The language of the letter, inclosing the remittance, is inconsistent with the notion of that remittance being made for the express purpose of paying this specific sum out of any particular fund. It is merely a general letter, stating that the writer will be obliged, &c.

Gaselee now showed cause. He contended, that the facts on which the case of *Williams* v. *Everett*

Saturday, 27th June.

(a) 14 East, 582.

proceeded,

1816.

GRANT and others v. AUSTEN and others.

proceeded, sufficiently varied that case from the present, to render it inapplicable to the point before the Court. In that case, there had been an *express dissent* on the part of the defendants, to the application of the remittance to the purpose for which it was sent. They had actually refused to endorse the bill away, or to act upon the letter; and that refusal is emphatically noticed by Lord *Ellenborough*, in delivering the reasons on which his decision on that case proceeds, by which his Lordship says, any implied consent on their part is negatived. In the present case, there was no dissent expressed by the defendants to the order sent by *Gray*; and their not having refused to do so, may be considered as tantamount to an implied consent, whereby the money became appropriated to the use of the plaintiffs; and the more so, as this was money actually paid to *Gray* by the plaintiffs, and through him to *Austen* and Co.

As to any difficulty arising from the question of the efficacy of an assignment of a chose in action, the cases of *Row* v. *Dawson (b)*, *Schellinger* v. *Blackerby (c)*, *Ryall* v. *Rowles (d)*, *Israel* v. *Douglas (e)*, *Moulsdale* v. *Birchall (f)*, and *Fenner* v. *Meares (g)*, sufficiently obviate all objection on that ground; and the assignee may bring *assumpsit* on an assignment of a chose in action.

(b) 1 Ves. 331.
(c) Ib. 347.
(d) Ib. 362, 363. 367.
(e) 1 H. Bl. 239.
(f) 2 Bl. 820.
(g) Ib. 1269.

The

1816.

GRANT and others v. AUSTEN and others.

The cases most in point with the present, are those of *Israel* v. *Douglas (h)*, and *De Bernales* v. *Fuller (i)*. In the first case, the action for money had and received, was held well brought against the defendant, who was the debtor, not of the plaintiff, but of a person by whom the debt had been transferred to the plaintiff. In the other, it was held, that for money paid by the acceptor of a bill lying due at *Fuller*'s house, to take it up with, an action for money had and received, might be maintained by the holder against *Fuller*, although it was not received by *Fuller*, with a consent on his part, to apply it in discharge of the bill; and although he had, on the contrary, chosen to apply it in discharge of a debt due to himself by the acceptor.

The sole question is, Whether the sum sued for, was received by the defendant, clogged with the trusts created by the purposes for which the money was remitted? There were other remittances accompanying the letter, to a considerable amount, far exceeding the several specific purposes for which they were made; and the defendants having received them, and neither sending them back, or expressing any dissent to the proposed objects of them, were bound so to apply them.

As to the language of the letter, that is mere matter of common parlance, and can have no legal effect in this case.

(h) 1 H. Bl. 239. (i) 14 East, 590.

Gifford,

1816.

GRANT and others v. AUSTEN and others.

Gifford, in support of the rule, admitted the point to be as put; but observed, that in *Israel* v. *Douglas*, there was an express contract between all the parties, that one debtor should be substituted for the other. In that case, a question arose on the old doctrine of non-assignment of a chose in action, which was obviated there by the consent of the debtor to the transfer; and it is clear that, without such consent, an action cannot be transferred, and on that all the cases of such assignments depend.

[THOMSON, *Chief Baron*. That gives rise to another question here, of, whether there was, on the other hand, any dissent on the part of these defendants.]

In the case of *De Burnales* v. *Fuller*, there was an express and specific appropriation of the money paid in discharge of *Fuller*'s acceptance; and that is the reason given by Lord *Ellenborough*, in delivering judgment in *Williams* v. *Everett*, for the decision in the case of *De Burnales* v. *Fuller*; and in that view, his Lordship says, that "they (*Fuller* "and Co.) were, in effect, to be regarded in "that case, as the plaintiff *De Burnales*' agents, "through the intervention of *Newnham*'s house, "for the purpose of that receipt, and could there- "fore hold and apply it to no other." Here the strength of the defendant's case is, that there was no specific remittance of the precise sum of 69*l.* 15*s.* for the express purpose of the letter. It was a general letter, on general business; and, at the time it was written, *Gray* was largely indebted to the

1816.

GRANT and others v. AUSTEN and others.

the banking-house of *Austen* and Co. He does not even profess to appropriate any part of the remittance for the purpose, by an express order, but says generally, "I shall be obliged by your paying "*Ladbroke* and Co." so much money to be carried, of course, to his general account.

THOMSON, *Chief Baron*. If we were to hold these defendants liable to the present demand of the plaintiffs, we should be carrying the doctrine farther than any case has hitherto gone.

There was certainly no such sum sent up, specifically, for the purpose of this payment, to *Ladbroke* and Co. A draft had been given by the plaintiffs to *Gray*, for that sum, but what became of that, does not appear. After receiving that check, *Gray* sends to the defendants a considerable remittance, and then comes this letter, which is supposed to be a precise direction, appropriating the sum in question.—[*His Lordship read the letter.*]—Several particular sums are specified in it, and among the rest, this of 69*l.* 15*s.*; but they are not directed to be paid out of the money remitted. That letter came by the coach, after banking hours. No payment, however, was made by the persons in town, to *Ladbroke* and Co. on behalf of *Grant* and Co.—[*His Lordship stated the subsequent circumstances and correspondence, which consisted merely of a request of payment by Grant and Co., and a refusal by Austen and Co.*]—Now what is there, in this case, to signify any assent on the part of these defendants, to a specific appropriation of this parti-

1816.

GRANT and others v. AUSTEN and others.

cular sum? If we were to say that this demand of *Grant* and Co. was well founded against *Austen* and Co., we should decide that every other person mentioned in the letter, had a specific lien in their favour, on the money remitted. There is no assent shown, certainly, on the part of the defendants, to the requests contained in that letter; on the contrary, it appears that the whole account between the parties was soon after broken up.

In the cases cited, we can find no authority on which we can say that the circumstances of this case amount to any thing like a good and effectual appropriation, and therefore there must be a nonsuit entered.

GRAHAM, *Baron.* I am of the same opinion, and was so on the trial at the assizes.

A good draft was certainly sent to *Gray* and Co. by the plaintiffs, *Gray* and Co. therefore, were their proper debtors. They, however, send it to *Austen* and Co., their bankers, to whom they were, at the time, largely indebted, requesting them to pay this, their own debt, (and which they, *Gray* and Co. ought to pay) to *Ladbroke* and Co., for *Grant* and Co. *Austen* and Co., in fact, refuse, and think proper to pay themselves. Now there is nothing to fix them with any privity or participation in the transactions between *Grant* and *Gray*; and it is impossible to fix them by any subsequent act with the debt due from *Gray* to *Grant* and Co., without their express consent. This is, therefore,

an

an ineffectual attempt to substitute *Austen* and Co. for *Gray* and Co. as the plaintiffs' debtors.

1816.

GRANT and others v. AUSTEN and others.

WOOD, *Baron.* In order to constitute an appropriation of this sum, there must have been a consent. This is not the case of a specific sum sent for this particular purpose;—there is a general sum remitted, with directions to pay various particular sums, but not expressing that those payments should be made out of the sums sent. No notice was given to the persons to whom the money was so directed to be paid. All those persons might bring actions against *Austen* and Co. for the sums directed to be paid to them, if the remittances and the letter rendered them liable to the plaintiffs, in the present action.

RICHARDS, *Baron.* I do not mean to say, that consent is, in all cases, necessary; but, in the present case, which is particularly circumstanced, I think there should have been an express assent to fix the defendants.

Rule absolute.

1816.

Saturday, 29th June.

SQUIER *v.* HUNT and others.

It is not necessary, in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach.

THIS was an action of *assumpsit* (special *) brought for not delivering a quantity of cork sold to the plaintiff by the defendants. It was tried before Mr. Justice *Park*, at *Exeter* (Spring Assizes,) who non-suited the plaintiff, on the ground of his proofs varying from the allegations in the third count of the declaration.

Proof that it was part of the contract, that plaintiff should pay for the goods *by bill at two months on invoice or delivery*, is not a fatal variance from a statement in the count that they were to be paid for by *a bill at two months*.

That count stated, that plaintiff having bargained to buy a quantity of cork, then being on board the *Mary*, at *Penzance*, at the rate of 20*l. per* ton, to be delivered to plaintiff, on request, in case he should give notice of such bargain and sale to the captain of the ship before he should have sold the said cork to any other person, and to be paid for by the said plaintiff to defendants, by a banker's bill, payable at two months, in consideration, &c. Defendants undertook, &c.—Averment, that after the making said promise, and undertaking, and before the captain had sold the said cork, said plaintiff gave him notice of the bargain and sale, and was then and there ready and willing to accept the

Demand of delivery of the goods sold is sufficient proof of an averment that plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant when he was not himself present to have done so, if required on the spot.

* Vide *Anderson* v. *Scott*, 1 Campbell, 235 (note), where Lord *Ellenborough* ruled, that although there had been an incipient delivery, sufficient to take the case out of the statute of frauds, yet that delivery not being perfected, plaintiff had a right to an action in the present form, to recover damages for the non-completion of the contract.

Special *assumpsit* is the proper form of such an action.

name,

same, and to pay the defendants at the rate and in manner aforesaid; yet defendants refused to deliver, &c. 1816. SQUIER v. HUNT and others.

The plaintiff's foreman proved the contract for the sale of the cork, as contained in the defendant's letter, delivered by him to the captain, which was to the following effect:—Deliver the cork, if not sold, to Mr. *Thomas Squier*,—the mode of payment to be by a banker's bill at two months on invoice; if cellared, to pay a proportional part of the cellarage for letting it remain till plaintiff sent for it.

Moore and *Gifford* now obtained a rule for setting aside the non-suit, and awarding a new trial; against which, *Saturday, 4th May.*

Gaselee showed cause, relying on the variances on which the non-suit was founded; and that the contract was not proved, as stated in the count. He also submitted, that the plaintiff ought to have given some evidence, that he was ready and willing to pay for the cork in the mode agreed on, according to his averment, as was held by Lord *Kenyon*, in *Rawson* v. *Johnson (a)*, which he had not attempted to do; and that that was, in this case, the more necessary, as he did not attend himself to demand the cork, but sent his foreman for that purpose. *Saturday, 29th June.*

The contract, as proved, was, that the plaintiff was to pay for the goods by a bill at two months,

(a) 1 East. Rep. 207.

1816.

SQUIER v. HUNT and others.

on invoice; but, as laid, he states payment was to be made by a bill at two months, importing that the goods were to be so paid for immediately. It was proved also to be part of the contract that the plaintiff was to pay a proportional part of the cellarage, if the goods were allowed; whereas there is not a syllable about cellaring in the declaration.

Moore and *Selwyn*, in support of the rule, insisted that the payment of a proportional part of the cellarage, was not a material part of the contract, or necessary to be set out in the declaration.

[WOOD, *Baron*. It is not necessary to state or prove every part of a special contract.]

In *Cotterell* v. *Cuff (b)*, it was held sufficient if the plaintiff state as much of the contract as relates to the point of which he complains.

A bill to be given at two months on invoice, is still a bill at two months; the allegation is general, certainly, and the proof somewhat more particular; but that has never been held to be a variance, and it agrees with the course of trade that the bill should be given then.

The demand of the cork amounts to a conditional tender of the bill, and dispenses with all necessity of proof of a readiness to give the bill, as stated in

(b) 4 Taunton, 287; and *Clarke* v. *Gray*, 6 East. Rep. 659.

the

the averment. So it was ruled in the case of *Wilks* v. *Atkinson* (c).

THOMSON, *Chief Baron.* It appears that this cause was originally left to the Jury, but that during their deliberation, the Judge retracted that reference, being of opinion that, as the count was not proved as laid, the plaintiff ought to be nonsuited.

Now it does not strike me, that there are any of those material variances which have been supposed. As to the paying a proportional part of the cellarage, that part of the contract was only conditional; that is, that he should pay it only in case the goods had been cellared; and it does not appear that they were; and therefore it was unnecessary to bring that into this declaration, or to introduce any thing not material to the ground of action.

Then, as to being paid for by a bill, that must necessarily mean by a bill to be given on delivery of the goods, or invoice. It was not in evidence that he was to pay in two months from the time of the purchase. There is no other material variance, and, therefore, I am of opinion, that there ought to be a new trial.

GRAHAM, *Baron.* I am of the same opinion. I thought, at first, that there was something in the objection of want of proof of the averment, on the authority of Lord *Kenyon*, in the case of *Rawson* v. *Johnson*; but the decision in *Wilks* v. *Atkinson*,

(c) 1 Marsh. 512.

1816.

SQUIER v. HUNT and others.

is quite conclusive, that the demand of the article is proof of the averment of readiness to pay.

WOOD and RICHARDS, *Barons*, concurred.

Rule absolute.

1816.

Friday, 2d July.

The ATTORNEY GENERAL *v.* STEVENS & PRALL.

Where the defendants in a joint information employ two different attornies and clerks in court, if notice of trial be served on one of them only, and a verdict be obtained, the Court will set it aside, and award a new trial as to both, notwithstanding the offence charged be one which would affect them both as partners in trade: the costs of the trial already had, to abide the event of the second verdict.

PEAKE had obtained a rule, calling on the Attorney General to show cause why the verdict given for the Crown, in this information, at the Sittings after *Easter* Term, should not be set aside, and a new trial granted, under these circumstances.

The affidavit of *Prall* stated, that the defendants were in partnership, in the trade of wine merchants, at *Rochester*; that *Stephens* was very old and infirm, and left the entire management of the business to *Prall*; and that a joint information was filed against them on a charge of mixing Cape with other wine, and for smuggling brandy. They were both served with *subpœnas*, to which they appeared and pleaded, each by a different solicitor and clerk in Court; that being conscious of not having committed any of the offences charged against him, he had instructed his attorney to prepare his defence; that the information had, to his great surprise, been tried, and that the Crown had recovered a verdict for 400*l.* in penalties for the said offences, although

1816.

ATTORNEY-GENERAL v. STEVENS & PRALL.

although neither the deponent nor his attorney had received notice of trial; that he was prepared for his defence, and that *Stevens* relying on him had taken no steps in the cause; that he had never heard from any one that notice of trial of the information had been given to Stevens, and that, for want of notice being given to the deponent, no steps were taken for his defence, or for that of *Stevens*.

The attorney, who acted for *Prall*, also swore, that after having procured a copy of the information, he never had notice of any further proceedings being had in the cause till the day before the trial, when he heard from the agent of the attorney of *Stevens*, that the cause was to be tried the next day; that neither he nor his clerk in Court, had received notice of trial; and that he had never had any communication with *Stevens* on the subject of the information, or with his attorney or agent, till the day before the trial; and that if he had received due notice of trial, he should have been prepared for the defence of *Prall*, which would have been also the defence of *Stevens*, who he believed had a good defence.

The attorney for *Stevens* deposed, that he was employed to appear and plead for his client only, but that having understood that *Prall*'s solicitor was preparing for his defence, which would also be that of the defendant *Stevens*, he therefore deemed it unnecessary to take any further steps on his behalf; and that when notice of trial was received by his agent

1816.

ATTORNEY-GENERAL v. STEVENS & PRALL.

agent as attorney of *Stevens*, he was not aware that the defendant *Prall* had had no notice.

The agent of *Prall*'s attorney swore, that he had directed his clerk in Court, to appear for *Prall*, which had been done; and that a separate plea was afterwards put on the roll, on the part of *Prall*; and that neither he, nor his clerk in Court, had received notice of trial, in the cause.

Dauncey and *Clarke* now showed cause; and they submitted, that, inasmuch as the defendants were partners in trade, and the offence charged affected them both jointly, which was, in fact, a fraud practised on the revenue, in the course of the conduct of that trade; notice to the Clerk in Court, of either, should be deemed good notice to both.

Peake, in support of the rule. The defendant *Stevens*, had a very reasonable object in defending himself apart from *Prall*, that he might have had a remedy over against him, if it had turned out that *Prall* had, by his misconduct, led him into the difficulty.

The Court decided, that under these circumstances, each defendant was entitled to a separate notice of trial; and *Prall* not having been served, they made the

Rule absolute,

as to both defendants. The costs of the former trial, to abide the event of the verdict.

REX,

1816.

Wednesday, 3d July.

REX, in aid of MAGNAY and others, *v.* WILLIAMS.

THE circumstances of this case were as follows: Messrs. *Magnay* and Co. were paper-makers at *Bledlow, (Bucks)*; and *Williams*, the defendant, a stationer, in *Cornhill*, was indebted to them for paper, to the amount of 1,006*l.* 16*s.* 6*d.* and on bills of exchange drawn by them, and accepted by the defendant.

On the 27th *May* last, *Williams* was duly declared a bankrupt, and the usual provisional assignment executed by the Commissioners. On the same day, *Magnay* and Co. who were indebted to the Crown in 1,010*l.* for duties of Excise on paper, made by them, lodged an Extent in the office of the sheriff, who took possession of the defendant's effects under it. *Magnay* and Co. had not given any bond to the Crown.

On the 30th of *May*, the defendant obtained an order *nisi*, for setting aside the Extent, and for an *amoveas manus*, on the ground that the prosecutor had not given any bond to the Crown, and was not such a simple contract debtor to his Majesty as was entitled to the Crown process; and that the debt from *Magnay* and Co. to the Crown, had been since paid.

Where a Crown debtor is entitled to an Extent in aid, by the practice of the Court, it is not necessary that he should have the sanction of the revenue solicitors, or of the officers of any of the revenue boards.

Before the late act (11 July 1817) a manufacturer, liable to duties of excise on the articles made by him growing due from day to day, was entitled to an Extent in aid, although he gave no bond to the Crown; but it is not so now. *Vide* the 4th section of the act, page 80.

The Crown is entitled to an Extent against such persons, immediately on the articles being manufactured, although not charged with such duties.

The

1816.

Wednesday, 19th June.

REX (in aid of MAGNAY and others) v. WILLIAMS.

The Solicitor General appeared on behalf of the Crown, and stated, that the Extent had not been issued by the Solicitors of any department of the revenue, and without consent of the Crown.

Martin and *Gaselee*, showed cause,—submitting, that neither the consent of the Crown, nor the interference of the revenue solicitors, or officer of any board, was necessary to give a right to issue the process, a doctrine now established by the practice which has prevailed in this Court for a series of years. Nor can any disclaimer on the part of the Crown affect the proceeding in this stage; that although no bond was given to the Crown by the prosecutors, they owed such a growing debt to the revenue as entitled them to the prerogative process, and the priority afforded by it. The finding by the inquisition, makes this a debt of record. The case of the *King* v. *Blatchford (a)*, goes the whole length of these propositions; and the doctrine there recognized received the full approbation of the Lord Chancellor, as is recorded in the case of *Phillips* v. *Shaw (b)*. Nor is the subsequent satisfaction of the Crown's debt, any ground for setting aside the Extent. The *King* v. *Blackett (c)* fixes that point; and, in fact, a Crown debtor having once obtained the process to recover a debt due, may, by the ultimate effect of it, make use of the produce to repay himself.

(a) 8 Ves. 241. (b) Anstr. 162.

(c) Vol. I page 96.

In

1816.

REX (in aid of MAGNAY and others) v. WILLIAMS.

In support of the rule, *Fonblanque*, *Selwyn*, and *Brougham*, contended, that the debt being put on record, by the inquisition, giving it the effect of a specialty, was a fallacy, as it was making the proceeding itself furnish its own foundation. Originally, the king's debtors alone were entitled to the process, (2 Maddox, 192,) and the practice of extending its beneficial effect to such debtors as the present, had crept into the Court only of late years. Such modern practice, therefore, ought not to be considered binding, unless sanctioned by the opinion of the Court, on their attention having been drawn to it, by its being made the subject of litigation.

[RICHARDS, *Baron*. It has been the practice of this Court, for upwards of fifty years, to issue Extents in such cases as the present.]

In the case of the *King* v. *Wilton (d)*, this Court had very recently set aside an Extent, which had issued on the usual authority of a Baron, on the ground that the debt due from the person in whose aid it was sued out, was not such a debtor to the Crown as entitled him to use the prerogative process: that, too, was the first instance of an Extent being set aside on that ground. It is certainly very difficult to distinguish the difference between a debt due to the Crown for duties on the paper made by a manufacturer, and those due from an innkeeper, in respect of post-horses, stage-

(d) Vol. II. page 368.

coaches,

1816.

REX (in aid of MAGNAY and others) v. WILLIAMS.

coaches, or any of the branches of his business, which make him, from time to time, a debtor to the Crown. The duties derived to the revenue from the exercise of the business of such a person, form a growing debt, as much as those accruing due in the present case, and are as much the object of the attention of the officers of the Crown. That case, too, is a direct authority for the summary interference of this Court, where it is considered due to the subject complaining of misapplication of the process. On the present occasion, no officer of any department of the revenue has interposed; and the Crown, by the mouth of the Solicitor General, disclaims all interference. This is, therefore, merely an Extent in aid, without the sanction of the Crown's concurrence.

The Solicitor General professed himself attending solely for the purpose of supporting the interest of the Crown, and therefore confined his arguments to the question of the subject's right to the prerogative process in aid, wherever he was borne out by the assent of any competent officer of the revenue acting on behalf of the Crown. He abstained from the merely private question, but admitted, that if the practice and the cases were not conclusive on the point, he should have doubted the right of an individual to acquire a title to the process by his own independent act, converting his simple contract debt into a debt of record.

Cur. adv. vult.

THOMSON,

1816.

Wednesday, 3d July.

REX (in aid of MAGNAY and others) v. WILLIAMS.

THOMSON, *Chief Baron*, now delivered the judgment of the Court.

Having stated the circumstances and question of the case, his Lordship observed, that makers of paper, who were subject to certain duties of Excise, were in the daily habit of incurring debts to the Crown, on paper manufactured by them, and were, therefore, themselves, constantly liable to the process of Extent at the suit of the Crown.

When the Extent in the present case issued, the persons in whose aid it was employed, are stated by the affidavit to have been actually indebted to the Crown in upwards of 1,000*l.* for duties. In such cases, the Excise may issue Extents, although the duties, not having been charged with the Excise, are not then payable. It is enough if they are due, which they are by the course of trade, as soon as the paper is manufactured.

We were referred to the case of the *King* v. *Wilton*.—That was certainly a most extraordinary case. The person suing out that Extent in aid, was under the necessity of eking it out, by adding debts caused by his own neglect, in paying his income tax and assessed taxes; and there was no instance to be found, after search, of any Extent having ever before been granted under similar circumstances.

The present case, on the contrary, stands on a very different footing. Here there was a *bonâ fide* debt

1816.

REX (in aid of MAGNAY and others) v. WILLIAMS.

debt owing to the Crown, for duties of Excise, accruing due from day to day. The Extent was therefore founded on the most usual and common grounds; and it is one of those cases wherein the Court have always held, that the prosecutor of the Extent is entitled to the advantage of this more speedy remedy.

Whatever regulations, therefore, it may be hereafter, on consideration, thought proper to make, with regard to the issuing Extents in aid, will be matter of future deliberation. At present, we are of opinion that this Extent has been properly issued.

Rule discharged.*

* The Act of Parliament which has recently passed, "to regulate the issuing of Extents in aid," (57 *Geo.* III, ch. 117, sec. 4.) has now taken away from debtors of this description, the power of resorting to the prerogative process.

Extents in aid not to be sued out by simple contract debtors to the Crown, &c. except in certain cases.

It is by that section enacted, "That from and "after the passing of this Act it shall not be lawful "for any person or persons, companies or societies of "persons, corporate or not corporate, who shall or "may be indebted to his Majesty by simple contract "only; nor for any such person or persons, com-"panies or societies, who shall or may be indebted to "his Majesty by bond for answering, accounting for, "and paying any particular duty or duties, or sum "or sums of money, which shall arise or become due "and payable to his Majesty from such person or "persons,

1816.

REX (in aid of MAGNAY and others) v. WILLIAMS.

"persons, companies or societies respectively, for "and in respect and in the course of his or their "particular trades, manufactories, professions, busi- "nesses, or callings; nor for any sub-distributor "of stamps who shall have given bond to his Ma- "jesty; nor for any person who shall have given "bond to his Majesty, either jointly or separately, "as a surety only, for some other debtor to his "Majesty, until such surety shall have made proof "of a demand having been made upon him on be- "half of his Majesty, in consequence of the non- "performance of the conditions of the bond by the "principal, and then only to the amount of the "said demand; to sue out and prosecute any Ex- "tent or Extents in aid, by reason or on account "of any such debt or debts to his Majesty re- "spectively, for the recovery of any debt or debts "due to such person or persons, companies or "societies, or to such sub-distributor of stamps or "surety as aforesaid; and that all and every com- "mission and commissions to find debts, Extent "and Extents in aid, and other proceedings which "shall be so issued or instituted at the instance of "or for such simple contract or bond debtor or "debtors respectively, and all proceedings there- "upon, shall be null and void: Provided always, "that nothing herein contained shall extend or be "construed to extend to preclude or prevent any "persons who shall or may become debtor or "debtors to his Majesty by simple contract only, "by the collection or receipt of any money arising "from his Majesty's revenue for his Majesty's use, "from applying for and suing out any commission

1816.

REX (in aid of MAGNAY and others) v. WILLIAMS.

" or commissions, Extent or Extents in aid, in case " one or more of such persons shall be bound to " his Majesty by bond or specialty of record in the " said Court of Exchequer, for answering, securing, " paying over, or accounting for to his Majesty, the " particular duties or sums of money which shall " constitute the debt that may be so then due from " such person or persons to his Majesty; any thing " herein-before contained to the contrary notwith- " standing.

Extent in aid not to issue on bonds for the payment of duties against any corporate body, &c.

" V. Provided nevertheless, and be it further " enacted, that no Extent in aid shall be issued on " any bond given by any person or persons as a " surety or sureties for the paying or accounting " for any duties which may become due to his " Majesty from any body or society, whether in- " corporated or otherwise, carrying on the business " of insurance against any risques either of fire or " of any other kind whatever."

END OF TRINITY TERM.

SITTINGS

SITTINGS AFTER TRINITY TERM,

56 Geo. III.

GRAY'S INN HALL.

Taylor and others *v.* Obee.—(By Bill of Revivor.)

1816.
Wednesday, 17th July.

The Court will set aside a contract, where there appears to have been great inadequacy of consideration, at a distance of more than seven years from the date of the deed, on proof of the inadequacy, and that the purchaser had knowledge of the value of the subject matter, and was in the confidence of the vendor, and ought therefore to have protected her by his advice from imposition, rather than have misled her for his own advantage.

Depositions in a cross cause, taken after publication of those in the principal cause, not admissible in evidence on the hearing of the latter.

A defendant will not be permitted to take his answer off the file for the purpose of correcting a mistake: the course is, to file a supplemental answer.

THIS bill was originally filed in *Michaelmas* Term 1809, for relief from a contract for the sale of certain leasehold premises, entered into and executed in *February* 1803, on the alleged grounds of inadequacy of price,—advantage taken of the age and infirmities of the vendor, and confidence reposed by her in the purchaser,—and of interruption in the enjoyment of the consideration.

The bill charged, in effect, that the (original) plaintiff, who was a widow of an advanced age, having, on the death of her husband, become possessed of the premises in question, (a house in

1816.

TAYLOR and others v. OBER.

Weymouth Street), had been prevailed on by the defendant, who was an experienced builder, and then much in her confidence, as the friend of her late husband, to sell them to him, in consideration of his allowing her to retain for her own use two rooms on the first floor of the house, and a coal-cellar, and paying her an annuity of 50*l.* a year for her life. The ground rent (8*l.*), the property-tax (amounting to 4*l.* 0*s.* 4*d.*), and the interest accruing, due on a mortgage debt of 330*l.* on the premises, were to be paid by the plaintiff up to the time of her death; and on those terms she executed an assignment of the lease (prepared by the defendant's attorney) on the 26th *March* 1803, and gave him possession from that time. The bill then charged that the premises were in fact worth 950*l.*; and that the defendant had made great profits by letting the rooms to lodgers. It also charged the defendant's disturbing the plaintiff and her servant in the quiet enjoyment of the rooms occupied by her under the agreement;—prayed that the indenture of assignment might be delivered up to be cancelled;—and that defendant should be ordered to give up the possession of the house, and account for the intermediate rents and profits; and to pay to plaintiff what should be found to be due to her from him, after deducting the sums paid to her.

The answer alleged, that at the time the defendant agreed to purchase the house, the plaintiff had actually engaged to sell it to another person, for an annuity of 45*l.* a year, and had taken a guinea in earnest of the bargain;—that the plaintiff acted in the business by the advice of her own attorney, who inspected the

the deed of assignment, and suggested an alteration to her advantage, which was afterwards introduced in the margin of the deed; that in case of her giving up the rooms, for the purpose of leaving town, the defendant was to allow her 10*l.* a year more, which was acceded to;—denied taking any unfair advantage, and disturbing the plaintiff in the occupation of the rooms.

The answer also stated, that since the execution of the assignment, the defendant had laid out 350*l.* on the premises in repairs; and had also furnished the several apartments of the house, which had increased their value to let; and insisted that the consideration paid to the plaintiff was the fair and full value.

[The defendant, in several places in his answer, relative to the value of the premises, (which he stated to be worth more, to be sold, than the sum of 450*l.*,) had omitted to alter the words "sub-"ject to the said mortgage," for the words "free "of the said mortgage incumbrance."

Therefore, an application was made to the Court, for permission to take the answer off the file, that it might be amended in that respect, on an affidavit that it was merely an error in the engrossment.

But the Court refused to permit it; saying, that the only mode by which that could be done, consistent with the practice, was by filing a supplemental answer, for the purpose of correcting the mistake.]

1816.

TAYLOR and others v. OBEE.

The mortgagee having given notice to the plaintiff to pay the mortgage money, the defendant paid 40*l.* to the mortgagee on account; but afterwards the plaintiff paid off the mortgage entirely, and took an assignment, and the mortgagee afterwards paid back the 40*l.* to the defendant. The legal estate becoming thereby vested in the plaintiff, she brought an ejectment against the defendant to recover the possession; and then the defendant filed a cross bill against the plaintiff, and obtained an injunction, on the merits confessed in the answer, to restrain the proceedings at law, on the terms of bringing the mortgage-money into Court, and paying the interest to the defendant.

On the part of the plaintiff, three witnesses, two surveyors and a builder, deposed, that the premises were worth, to be let, 70*l.* a year, or to be sold, about 850*l.*

The defendant examined no witnesses.

Martin and *Richards*, for the plaintiff, rested their case on the ground of gross inadequacy of price paid for the purchase, under circumstances which gave the defendant a great advantage over the feeble state of mind of the widow;—from the confidence she necessarily reposed in him, so recently on the death of her husband, whose intimate friend he was;—and the deed being prepared by the defendant's own solicitor all: which was sufficient evidence of fraud. The defendant had been consulted by her, and was bound to make a true repre-

sentation of the value of the property; and he has gone into no evidence to prove it true. The inadequacy of price, in this case, is evidence of an undue advantage having been taken, amounting to fraud. That is the doctrine of Lord *Thurlow*, as appears from the case of *Heathcote* v. *Paignon (a)*. It is recognised also in *Underhill* v. *Harwood (b)*, where it was held, that if from the inadequacy the Court was satisfied that there must have been imposition, it would interfere. In *Twisleton* v. *Griffith (c)*, also, a conveyance was set aside for inadequacy of consideration. In this case, the inadequacy was enormous; and no security was given for the annuity, but on the premises sold.

Dauncey and *Pepys* for the defendant.

The depositions in the cross cause being * offered in evidence for the defendant, the plaintiff's counsel objected to their admission; an application having been made to the Court for the purpose of getting an order that they might be read on the hearing, which was refused; submitting that there was no ground for the indulgence; and that it was not sworn that the defendant had no opportunity of, or was by any means prevented from, examining the witnesses before. The attempt to introduce the evidence now, was resisted on nearly the same grounds as the motion which was made in term for the order *(d)*.

(a) 2 Bro. 175. *(b)* 10 Ves. 209.

(c) 1 P. W. 311. *(d)* Vide ante, page 26.

* They had given previous notice of their intention to do so.

1816.

TAYLOR and others v. OBEE.

THOMSON, *Chief Baron.* It was the defendant's own fault that his witnesses were not examined. The points are certainly the same in both causes: but it was incumbent on the defendant (who had repeated opportunities, for the publication was frequently enlarged, which must have been on a representation that he had witnesses to examine) to have examined his witnesses in *this cause.* The general rule is of more importance than this particular case; otherwise, parties would continually lay by till the plaintiff had finished the examination of his witnesses; and it would be mischievous to permit depositions to be used at any distance of time. I regret that we should shut out any evidence; but the general rule cannot be relaxed.

GRAHAM, *Baron.* I was shaken by the argument of the Court, being driven to decide *ex parte*; but the rules of proceeding cannot be departed from. Publication of the depositions, taken on the part of the plaintiff in this cause, had passed; and therefore, though the cross cause certainly brings on the same point, the depositions taken in it cannot now be received. A motion was made in the term to be permitted to do this, which failed, and properly.

WOOD, *Baron*, of the same opinion.

RICHARDS, *Baron.* The nature of these examinations is the ground of the rule, the depositions in answer to the interrogatories being reduced to writing. It is not even argued, that if an application had been made to examine witnesses in this cause,

1816.

TAYLOR and others v. OBER.

cause, (in the present state of the proceedings,) it could have been granted; and yet to permit these depositions to be read, would be doing, *per obliquum*, the same thing, in effect. It is enough to refuse the admission of these depositions; that those published in this cause *might have been known* at the time when those were taken; not that there can be any suspicion, in this instance, that they were, for the defendant's solicitors are very honourable men. We must, however, adhere to the general rule.

The depositions were rejected.

It was then contended, that it has been long settled by all the cases on that point *(f)*, to be a rule, that inadequacy of price is no ground for the interference of a Court of Equity, to set aside a contract; but in this case, the evidence of value was particularly inconclusive, and by no means such as to justify the interference of the Court. The date of the application for relief, by the bill, amounts to a period of seven years after the contract. There was an attorney actually employed on the part of the plaintiff, who took an active part on her behalf. No incompetency to manage her affairs has been proved by the plaintiff, or of undue advantage taken by the defendant in any respect.

Martin, in reply, adverted to the recency of the transaction after the death of the plaintiff's hus-

(f) Heathcote v. *Paignon*, 2 Bro. 175; *Peacock* v. *Evans*, 16 Ves. 512; *Gowland* v. *De Faria*, 17 Ves. 20; *Western* v. *Russell*, 3 Ves. & B. 187.

band;

1816.

TAYLOR and others v. OREE.

band; the defendant's habits of confidence with her; her age and ignorance, and his experience and skill in the subject matter;—every thing emanating from her to him, and no mutuality of advantage proceeding from him;—and that no bounty was even hinted at as being intended by her. With respect to the argument raised, from the lapse of time between the transaction and the filing of this bill, he cited *Pickett* v. *Loggon(g)*, where the suit for rescinding the contract was not instituted till twelve years afterwards.

THOMSON, *Chief Baron*. It appears to me, that the circumstances of this case authorize the Court to interfere. The defendant was a builder by trade, and therefore must have been particularly conversant in the value of the premises purchased by him of the plaintiff. He had been in habits of intimacy with her deceased husband; and, therefore, she was entitled to expect, that if she consulted him on the subject of a sale of her property, he would advise her for her advantage. The parties being in this situation, a bargain is concluded between them for the purchase of these premises, without the intervention of a third person; and the contract is made and executed on the 23d *March*, not more than a month after the decease of the plaintiff's husband. It is true, she had the deed of assignment laid before her attorney, Mr. *Hall*; but it does not appear that he was

(g) 14 Ves. 215.

consulted

1816.

TAYLOR and others v. OBER.

consulted as to the propriety of the bargain; and it is therefore probable, that the deed was submitted to him merely for the purpose of ascertaining that it was rightly drawn, and technically proper. It is true, he introduces a provision for paying her 10*l.* a year more, in case of her giving up her apartments in the house; and she receives the annuity granted in consideration of the assignment, till her death, as *Taylor* does afterwards; but that annuity is not otherwise secured, than by way of mortgage on the premises sold, which it appears was let annually for much more than enough to pay it; and after her death, the whole interest in the lease, which was for seventy-one years, was to become the defendant's property, which is sworn to be worth 750*l.* or 800*l.* Then out of the annuity, she was to pay the ground-rent, the interest on the mortgage debt, and the property-tax, leaving her only about 20*l.* a year. Is not such a consideration enough to startle one? It is really giving nothing at all, and hardly deserves the name of a consideration. This is not such a contract as can be permitted to stand.

GRAHAM, *Baron.* I entirely agree. The situation of the parties imposed on the defendant an obligation to protect the plaintiff's interest; and he, on the contrary, takes an unfair advantage of that situation, and that in a very short period after her husband's death. Mr. *Hall*, indeed, appears to have been consulted as to the deed of assignment; but had he been called on to investigate the terms of the contract, he must have been startled. The

1816.

TAYLOR and others v. OBEE.

The house sold was capable of producing a rent of 70*l.* a year, and the defendant's schedule shows that he received 86*l.* The rooms were furnished, it is true, but that could not have amounted to such a difference; and beside that, the plaintiff occupied part of the house himself. He appears to have had a clear profit of 56*l.* per annum. Can it be said that here was no inadequacy of price? The plaintiff, besides, was to pay all the incumbrances; and the consideration was secured on the premises themselves. She was induced, therefore, as it seems to me, to part with her property without any consideration at all.

WOOD, *Baron*, of the same opinion. I agree that mere inadequacy of price is not a sufficient ground for setting aside a contract. That the consideration, in this case, was greatly inadequate, there can be no doubt; but that is not alone the ground I proceed on in giving my opinion that the plaintiff is entitled to the relief prayed. My opinion is founded on the circumstances of the defendant's having been consulted by the plaintiff,—his being her confidential friend,—his knowing the true value of the premises,—and his having, under those circumstances, induced her to enter into a contract, which was at once advantageous to himself and injurious to her; and, therefore, I think that it should be set aside.

RICHARDS, *Baron*. The relative situation of these parties, appears to me to be sufficient ground for avoiding this contract made between them. The plaintiff's

1816.

TAYLOR and others v. OBEE.

plaintiff's confidence in the defendant, entitled her to his best counsel. It is true, that there is no evidence of her having actually consulted him as to the sale of these premises; but there is enough before the Court to enable us to say, that it must be so understood. Any one possessing the confidence of a party, must be regarded as in the situation of attorney of that party, and should not be allowed to take advantage of that situation. This defendant, it appears, has done so, and that immediately after the death of her husband. If the plaintiff had died in a month after the bargain was concluded, the defendant would not have paid her a shilling consideration; though, had she lived much longer than she did, the consideration would have been totally inadequate. When we take into the account the charges to be satisfied by the plaintiff, out of the annuity proposed to be paid her, we must be struck with the unfairness of the transaction.

The acquiescence, for however long a time, I consider as nothing.

Decree.—The deed to be delivered up to be cancelled. Reference to Deputy Remembrancer, to take account of rents received, and money laid out in repairs.—Costs reserved.

The

1816.

20th July.

The KING *v.* PLAW.

The capias clause of the writ of Extent is not usually enforced: and where there have been also effects seized sufficient to satisfy the debt, the Court seemed disposed to order the discharge of a defendant taken under it, on his giving security for his appearance at the return of the writ.

THIS was a motion for a rule to show cause why the Extent in aid should not be set aside; and that the defendant, whose person had been taken, might be discharged out of custody; and for an *amoveas manus*.

The only point in this case worth notice, since the late statute *(a)*, relates to the discharge of the defendant's person.

Dauncey stated, that the object of the application was, that the defendant might be enlarged, for the purpose of going abroad to collect his debts; that application had been made to the prosecutor of the Extent for that purpose, in vain; and that sufficient property of the defendant's had been seized to satisfy the debt.

Roupell appeared for the prosecutor of the Extent.

THOMSON, *Chief Baron*. It is certainly a most unusual thing, in such a case as this, to take a defendant's person, even where the Extent is, in fact, at the suit of the Crown.

(a) 56 Geo. III. ch. 117.

GRAHAM,

1816.

The KING v. PLAW.

GRAHAM, *Baron.* If there be reasonable ground to satisfy the Court, that enough of the defendant's property have been seized to cover the debt, I think that the person should be released. Originally, the *capias* clause was only inserted in the case of the Crown; and the Court has a discretion in awarding either *extendi facias*, or *capias corpus*, as it may see fit. I should be inclined to favour this motion, for it is certainly a hard case.

WOOD, *Baron.* I, for one, should certainly order that clause to be struck out. If the defendant give security for his appearance at the return of the writ, he ought to be enlarged: what more can any one require?

The Court ultimately recommended an arrangement between the parties.

The statute above alluded to has the following provision for the relief of persons in custody under Extents in aid:

Persons imprisoned under any writ of *capias* in Extents in aid, may apply to the Courts of Exchequer for their discharge.

By Sect. VI. it is enacted, "That it shall and "may be lawful for any person or persons who may "now or shall hereafter be imprisoned under or by "virtue of any writ of *capias* in any Extent or "Extents in aid, to apply to the Barons of his "Majesty's Court of Exchequer in *England* or "*Scotland*, or to any Baron of the same Court in "vacation, for his, her, or their discharge, giving "one month's previous notice in writing to the per-"son or persons to whom he, she, or they owed the "debt

1816.

The KING v. PLAW.

" debt or sum or sums of money for which he, she, " or they is or are so imprisoned, at the time such " debt was seized under such Extent in aid, of his, " her, or their intention to make such application, " and stating in such notice the ground of such " application, and an enumeration and description " of all and every the property, debts, and effects " whatsoever of such person or persons in his, her, " or their own possession or power, or in the posses- " sion or power of any other person or persons for " his, her, or their use; and for the said Court, or " any such Baron in vacation to whom such appli- " cation shall be made, to order such person or " persons to be brought before them or him to be " examined upon oath touching and concerning his, " her, or their property and effects, and if such " person or persons respectively shall, upon such " examination, make a full disclosure of all his, her, " or their property and effects, to the satisfaction " of the said Court or Baron, or it shall otherwise " appear reasonable and proper to such Court or " Baron that such person or persons should be no " longer imprisoned under such writ, for such Court " or Baron to order a writ of *supersedeas quoad* " *corpus* to be issued out of the said Court for the " liberation of such person or persons from such " imprisonment: provided always, that no such " liberation as aforesaid shall be held or deemed to " satisfy or supersede such Extent in aid or any " proceedings thereon, except as to such imprison- " ment as aforesaid, or the debt or debts seized " under and by virtue thereof, and for which such " person or persons shall be so imprisoned."

The

8 C B u 06

8. P. T. 44

The ATTORNEY GENERAL *v.* NORSTEDT, (claiming the Ship *Triton.*)

1816.

Monday, 22d July.

10 Ap. Ca. 6

A judicial sale of a vessel found at sea and brought into port as derelict, under an order of the Instance Court of the Admiralty, on the part of the salvors and claimant (without fraud), is available against the Crown's right of seizure for a previous forfeiture, incurred by the ship having been guilty of a forfeitable offence against the revenue laws: although the Crown was not a party to the proceeding in the Admiralty Court, other than by the King's Procurator General claiming the vessel as an *Admiralty droit*; and although no decision of droit, or no droit, was awarded, and the sale took place *pendente lite* under an interlocutory order.

The Crown should have claimed before the Court, either as against the ship in the first instance, or subsequently against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale, or have moved a prohibition.

The warrant for arresting a ship by the Admiralty, and the process of citation, is notice to all the world of the subsequent proceedings.

In pleading such sale, in defence to an information, the facts should be put specially on the record, so that the Attorney General might demur to, or traverse them.

THE great and important question which arose in this novel case, was, whether, after the public sale, by commission, of a ship *derelict*, under a regular judicial sentence of the Instance Court of Admiralty, she still remained liable to be seized by the officers of the Customs, while in the possession of a *bonâ fide* purchaser under that sale, as having become forfeited to the Crown, for an offence against the revenue laws, (39 *Geo.* III. c. 59.) proved to have been committed before such sentence and sale; or, whether the previous forfeiture was not purged by the proceedings and sale, and the right of seizure for ever lost to the Crown.

The material facts of this case, as they appeared on the trial of the information, and respected the question before the Court, were, that the ship had unquestionably incurred a forfeiture *in the month of October* 1813, (whilst she was the property of Messrs. *Eberstein* and Co. of *Nordkoping*, in

1816.

ATTORNEY-GENERAL v. NORSTEDT.

Sweden, in having committed the offence charged by the information, which was, the having re-landed at *Deal* some bales of Bandanna silk handkerchiefs, which had been shipped on board of her for *Lisbon*, but without any participation or knowledge on the part of the owners or their agents;—that in the course of the voyage to *Lisbon*, the ship was run foul of in the night-time by another vessel, whereby she was so considerably damaged and disabled, as that the captain and crew thought it necessary to desert her for the sake of their personal safety; and they accordingly left her, and took refuge on board a transport. The ship, however, did not founder, as had been expected, and eventually righted. In that state, she was soon afterwards found by his Majesty's ship *Scylla*, who took her and towed her into *Scilly*, as *derelict*, on the 7th *December* 1813. She was there, (as was proved by the certificate of the commissioner and auctioneer) *sold by public auction*, (25th *April* 1814) by virtue of a commission of *appraisement and sale issued from the High Court of Admiralty*, under an order of the Court to pay the demand of salvage, and other expenses.

The commission, [after reciting the proceedings in the Admiralty against the ship *Triton* and cargo, as being a ship and goods *derelict*, &c. and as such, the right of the Crown,—and against the officers and crew of the sloop *Scylla*, intervening as salvors,—and against *George Cowie*, claimant of the ship, and *R. A. Gray*, claimant of the cargo, intervening;—and that the Court, duly proceeding at the joint petition of the proctors of the salvors and claimants,

(the

1816.

ATTORNEY-GENERAL v. NORSTEDT.

(the Procurator-general, of the King in his office of Admiralty, not objecting thereto,) required the commissioners to cause the ship to be inventoried and appraised, to be exposed to public sale, and sold to the best bidder; and to bring the produce money into the registry of the Court, within two months from the date of the commission, to be there kept for the use of the person who should be entitled thereto. The proceeds were (after payment of the salvage) paid over to *Cowie* & Co.—See p. 132.

At the sale under that commission, she was purchased by a person who acted as the agent of *Samuel John Billing*, the late master. The net proceeds of the sale, after those payments had been made, were accounted for to the underwriters on the ship, who had paid the owners as for a total loss. By *Billing* the ship was afterwards transferred to *Norstedt*, the defendant.

These are the leading facts of this case; but there were also other circumstances, which, at first, seemed to cast a shade of suspicion on the transaction; and as they originally went far to justify the proceedings which were instituted against the ship, so, ultimately, they had the effect of rendering the judgment of the Court a much stronger decision in favour of the defendant, than it would, perhaps, otherwise have been; and, therefore, it may be necessary to state them, to make the report of this case the more complete.

They chiefly refer to the apparent connection of the parties interested at different periods in the

1816.

ATTORNEY-GENERAL v. NORSTEDT.

property in the ship, and gave rise at one time to a suggestion of collusion between them and the other parties, in the cause in the Admiralty Court, for the purpose of getting rid of the forfeiture by means of that suit. All suspicion of fraud, however, on the part of the present defendant, and the former owners of the vessel, was distinctly negatived by the jury on the trial; and, therefore, these circumstances are kept somewhat apart from the main facts, although it has been thought necessary to state them.

They are as follows:—*Billing*, who was the actual purchaser of the ship, at *Scilly*, was, in point of fact, the person who had been master of her at the time of the commission of the offence, by which she had become forfeited. He, on hearing of the intended sale, applied to Messrs. *Albers* and *Codner*, of *London*, the former agents of *Eberstein* and Co. the original owners; and also of the present defendant, to request them to purchase the vessel for him. *Billing* having satisfied *Albers* and Co. (as they said) that he knew nothing of the fraud which had been practised on the revenue, they commissioned him to make the purchase, and furnished him with a letter of credit, to enable him to do so, and that without any authority from Messrs. *Eberstein* and Co. After the completion of the purchase, *Albers* and Co. wrote to *Eberstein* and Co. offering them the vessel. They had in the mean time retired from business; but *Norstedt*, the present defendant, who had been their confidential clerk, and had since succeeded them, accepted the offer, and bought the ship.

The

1816.

ATTORNEY-GENERAL v. NORSTEDT.

The ship so sold, after making several voyages, arrived in *England*, in the month of *May* last, where she was seized by an officer of the Customs (one of the searchers), on the ground of the alleged forfeiture; and the present information of seizure thereon, was filed by the Attorney General against the defendant, charging the ship, in substance, with the offences already detailed, contrary to the form of the statutes, (5th *Geo.* I. cap. 11, sec. 6.—39th *Geo.* III. ch. 59, sec. 5 & 14.); whereby, &c.

The defendant having pleaded the general issue, the cause was tried at the *Middlesex* Sittings after *Easter* Term, and a verdict was found for the Crown, with liberty for the defendant's counsel to apply to the Court to set it aside, and enter a verdict for the defendant.

Saturday, 15th June.

Lushington, LL. D. and *Gaselee*, now obtained a rule to show cause, &c. on the ground, that the jury had found that the sale to the defendant was *bonâ fide*; and that he was not connected in the transaction with the former owners; so that the case was thereby entirely cleared of suspicion of fraud: and that the judicial sale by the Admiralty, had destroyed the former right of the Crown to the vessel as a forfeiture.

Friday, 28th June.

The Solicitor General, *Dauncey*, *Clarke*, and *Walton*, now showed cause.

They contended, that the Admiralty Court had no right to sell the ship, in the present instance, because all property in her had become vested in the Crown, by the forfeiture, and *eo instanti*: and could not be

1816.

ATTORNEY-GENERAL v. NORSTEDT.

divested by any thing which might afterwards have taken place. They submitted, that the Admiralty jurisdiction in the Instance Court, in a question of salvage, was very distinguishable, in its operation and effect, from that of a Prize Court of competent authority. The latter, being quite a different tribunal, may and does certainly exercise a controlling power under its sentence of condemnation; but that was, because the property was, in cases of prize, always changed by the act of the hostile capture; whereas, a mere collateral question on the claim of salvage, cannot give the Instance Court any authority to sell the ship to the prejudice of the pre-existing rights of absent persons. They urged, prominently, that the ship having completed a forfeitable offence, was *presently* forfeited; and that the Crown's right, which is indefeasible, attached immediately;—that subsequent condemnation was not necessary to perfect that right, as that ultimate sentence of the Court of revenue is entirely *alio intuitu*, and is only required to ascertain the fact on which the forfeiture is charged to be founded, to afford the person whose property has been seized, an opportunity of traversing the commission of the offence, and to give the Crown a greater facility of disposal of the vessel, and confirm to the person who acquires her, an ostensible title, conclusive against all the world, by the mere production of the record.

That the Crown's right accrues instantly, and is to be preferred (they submitted), sufficiently appeared, from the decision of this Court, in the case of *Score* v. the *Lord Admiral (a)*, which

(a) Parker, 273.

was

1816.

ATTORNEY-GENERAL v. NORSTEDT.

was also, in other respects, applicable to the present question. In that case, a ship laden with French goods, coming into the port of *Penzance*, was seized by the admiral's officers, as a perquisite of the Admiralty. A Custom-house officer afterwards seized her as forfeited on the French Prohibition Act, (for bringing prohibited goods into *Penzance*,) exhibited an information, and moved for a prohibition; and, upon debate, it is reported to have been granted, for the ship was *presently forfeited* by the Act of Parliament, upon *coming into port*, and the seizure, after, of the Admiralty did not prevent the forfeiture. There is also a note to that case, wherein it is said, that Lord Chief Baron *Ward* cited a case, in the time of Lord *Hale*, where goods were put on board, the duty not being paid, and became *flotsam*; and a suit was commenced in the Admiralty, who have jurisdiction of *flotsam*; and, upon an information in the Exchequer, for a forfeiture in regard they were shipped before duty paid, a prohibition was granted; for the Crown had a title by the forfeiture; and the goods becoming *flotsam* afterwards, did not purge the forfeiture. These cases, then, clearly establish, that a ship offending against statutes creating forfeitures, is forfeited *presently*; and also, that the forfeiture cannot be purged by subsequent occurrences. The vessel in question, therefore, becoming presently forfeited by the offence committed by her, the subsequent wreck and its consequences, could not defeat the Crown's right. In the case of the Crown, there can be no laches objected as a reason for precluding its claim at any distance of time,

1816.

ATTORNEY-GENERAL v. NORSTEDT.

time, as no delay can defeat its rights; and there is no doubt, also, that the officers were ignorant of the forfeiture having been incurred at the time when this sale took place, though neither the want of knowledge, or even culpable neglect of those officers, can be permitted to prejudice the Crown. To hold that such a sale as the present could extinguish previous rights of property in the thing sold, would be to ascribe a much greater efficiency to a decree of the Court of Admiralty, than is incidental to that of any other Court; for it would be deciding, that a ship being wrecked at sea while in the tortious possession of a wrong-doer, might, on a suit instituted by salvors, be sold, irreclaimably, by the Court of Admiralty, to the destruction of the title of the right owner, and that, perhaps, by purpose collusion. The decrees of other Courts affect not to bind others than parties to the suit. A heir at law, not being a party in the cause, is not concluded by a decree for the sale of an estate, by the Court of Chancery; yet it is to be contended, that an adjudication of sale by the Court of Admiralty, is to bind not only the king, even although he is not a party to the suit, but all the world. In both the authorities cited, this Court would not suffer the Court of Admiralty to proceed in cases where the ship had previously incurred a forfeiture, and that on the principle of the Crown's incipient but vested right, depriving that Court of jurisdiction.

[GRAHAM, *Baron*, put the case of the ship having been sold by a sheriff under execution.]

It

It was submitted, that that would not be such a conversion of the property as would destroy the right of the Crown to seize it as soon as found.

The salvors, in this case, it was admitted, would have had a lien on the ship against the parties interested in her, under the 27 *Edw.* III. c. 13; but no more. Yet surely that could not give a Court which has jurisdiction of salvage questions, a right to sell the ship; and the more especially, as the salvor's lien, the only subject matter of the suit, would continue, till satisfied, as well against all titles of the Crown, as of the subject. This may be called a hard case, as to the *bonâ fide* purchaser; but it is no more so than any other case of a sale by a vendor having no title, and *caveat emptor*. The Crown has no means of following or recovering the purchase-money when once in the possession of the vendor. The goods of a felon are not forfeited till conviction; but a sale of them to an innocent purchaser before attainder, would not divest the right of the Crown. Suppose the owner of this very ship, being a British subject, had been convicted of felony while the vessel was at sea, and the same circumstances had transpired, the Crown's right would certainly not have been barred by the sale.

As to the jurisdiction of the Court of Admiralty to sell vessels without the consent of parties interested, the case of *Reid* v. *Darby* (*b*), was cited,

(*b*) 10 East, 144.

where

1816.

ATTORNEY-GENERAL v. NORSTEDT.

where the question being, Whether the Vice-Admiralty Courts abroad had authority, on the mere petition of the captain of a ship, bound on a foreign voyage, to decree a sale of her, on being reported to be not sea-worthy? Lord *Ellenborough* said, that "for the power of making a valid sale under the "decree and commission of the Vice-Admiralty "Court of *Tortola*, upon the fullest inquiry we have "been able to make, we find no adequate foundation "in the legitimate powers of the Admiralty Court." No instance has been discovered, in which such a power has been exercised in the Admiralty Court at home. That, though certainly not the same case, bears, notwithstanding, a near affinity to this, and in *pari materia*, and at least affords matter for argument, as far as it goes. That, also, was a sale by the Court of Admiralty, in the progress of a suit, and held, notwithstanding, to be not binding.

Then, if the Admiralty have a right to sell a ship at all under these circumstances, another question will arise, as to who are bound by the sale? and, whether persons who are not party to the proceedings are? All principle is against such a proposition. The Crown was not a party to this suit, at least as demanding *the forfeiture*; nor could the Court have entertained the question of forfeiture, or no forfeiture, if it had. This is the only proper tribunal for such matters. To carry the case further—Supposing the Admiralty had ordered the ship to be *restored* to an offending owner, that, it must be admitted, would clearly not bind the Crown; and their argument

ment has to struggle with that difficulty. It may be said that the purchaser has no means of knowledge of the offence committed against the revenue laws, and of the consequent forfeiture; but if the ship had been merely sold to a purchaser after the act of forfeiture, without this supposed sanction of the Admiralty, there can be no doubt that the ship might have been seizable in his hands; and that would have been a case equally hard. *Norstedt*, moreover, if really aggrieved, has a remedy by action against *Eberstein*, as the vendor, the sale being with his consent and for his benefit, if he have sold to him what he had no right to sell. A case was cited, as having occurred in the Court of King's Bench, where a purchaser recovered in an action, against the seller of a ship, which had been seized after such a sale.—[It was admitted, that in case of a sale by a private party, under such circumstances, the purchaser would have a right of action.]—It was ultimately much pressed, that if a proceeding of this sort should be held to constitute a valid sale, as against the right of the Crown accruing by the previous forfeiture, the statute of 39th *Geo.* III. would have been passed in vain; for means would then be readily found of eluding the consequences of every act of forfeiture amounting to an offence against that statute. Under these circumstances, and for these reasons, it was submitted that the verdict of condemnation was right, and ought to be retained.

[GRAHAM, *Baron*, having suggested that the vessel, in this case, being sold as a droit of Admiralty,

1816.

ATTORNEY-GENERAL v. NORSTEDT.

ralty, the King's Advocate General must have consented; Dr. *Lushington* observed, that the King's Advocate General would have had a right to be heard against the sale, but that the Court takes upon itself to sell, whether the Crown consents or not. The counsel for the Crown then submitted, that in that case it would amount to no more than a question between two different departments of the Crown, as to which was entitled to make the seizure: and so it was in the cases cited; for it came to a question between the Admiralty officers and the officers of the Customs; and there was nothing uncommon in the different departments of the Crown having conflicting interests, as was the case between the Treasury and Navy departments, in the much agitated case of the *King* v. *Mainwaring* and *Boyd (c)*, where there was a question of priority of debts; and they contended that it was quite clear that one department of the Crown consenting to an act prejudicial to another department, was not binding. As to the concurrence of the Advocate General, his interest in the question was at an end as soon as the vessel was recognized and claimed, for she could no longer be considered *derelict*, so that the sale is ultimately decreed by consent of the salvors and claimant; the King's Advocate merely not dissenting, which he had then no right to do; because he could not be supposed to know any thing of the previous forfeiture, (for it was not noticed in the course of these proceedings,) and was merely a formal mover of the suit *(d)*.]

(c) Ante, Vol. II. page 67.

(d) See pages 60 & 93.

Lush-

1816.

ATTORNEY-GENERAL v. NORSTEDT.

Lushington, LL.D. and *Gaselee*, supported the rule. They admitted that an act of forfeiture had been committed by the ship, whilst she was the property of *Eberstein*; but insisted that there was not a shadow of suspicion attached to him as being party to, or even cognizant of, the offence.—They submitted, that nothing further was necessary to the defendant's case, than *the production of the decree of the Instance Court of Admiralty*, which ordered the sale; for, being a Court of competent jurisdiction *proceeding in rem*, that decree was conclusive, and bound this Court and all others: nor had any Court, to whom it should be produced, a right to enquire on what proceedings or merits it had been pronounced. That is a broad proposition of liberal doctrine—of universal law, founded on the commercial intercourse of states, and acknowledged *jure gentium*. A detail of the course of proceedings in the Admiralty Court, may, however, serve to render more intelligible some of the arguments meant to be used in support of this rule, and to show the propriety and necessity of giving unquestionable effect to such decrees.—Whenever a ship is brought in as *derelict*, she is arrested by the Admiralty, and the warrant of the Instance Court for that arrest, contains an order for general citation of all persons interested to come forward with their claims; and that is, *per se*, notice to all the world. After ordering the marshal to arrest the ship, it proceeds *(e)*:—"and the same so "arrested you keep under safe and secure arrest until "you shall receive further orders from us; and that

(e) Marriott's Formulary, 326.

"you

1816.

ATTORNEY-GENERAL v. NORSTEDT.

"you cite at the premises all persons in general, "who have, or pretend to have, any right, title or "interest therein, to appear before us, or our Judge "of the said High Court of our Admiralty of *Eng-* "*land*, or his Surrogate, in the Common Hall of Doc- "tors Commons, &c."—There is then a process issued by the Court of Admiralty, requiring all persons who may be interested in the property, to come in and assert their rights: that is sometimes served personally, where it is practicable and necessary, and it is also posted in the Royal Exchange. In the present case, the suit being instituted, as is usual, at the instance of the Crown, was proceeded in in the accustomed manner, as set forth in the commission *.

As to the jurisdiction of the Instance Court,—it extends over all cases of bottomry, wages and salvage. It also has, in cases of revenue, an exclusive jurisdiction of appeal from the Vice-Admiralty Courts; the Privy Council having disclaimed on their part all jurisdiction in those cases, and they have accordingly lately refused to receive any appeals from the *West Indies*. It has, besides, under several of the revenue acts, an original jurisdiction to try forfeitures, given by the express words of those statutes. Thus, by the Navigation Act (12 *Ch.* II. ch. 18.), the commanders of ships of war are authorized and required to seize, and bring in as prize, all such ships and vessels as shall have offended contrary thereto, and deliver them to the Court of Admiralty, there to be proceeded against, and, in case of condemnation, one moiety of the consequent

* Ante, page 98.

forfeiture

1816.

ATTORNEY-GENERAL v. NORSTEDT.

forfeiture is allotted to them; so that it is at least matter of much doubt, whether the Admiralty Court had not jurisdiction to try the question of this very forfeiture, the act (39 *Geo.* III. ch. 59.) enacting, that the penalties imposed by it may be sued for, and recovered, in the same manner as penalties incurred for any offence against the laws of Customs. The exercise of the jurisdiction of the Admiralty Courts, whether the Instance Court or Court of Prize, is properly *in rem*, and accordingly, when a vessel has been arrested, whenever they deem it necessary, they order a sale, and that sometimes with, and sometimes without, consent; and it is even a common proceeding to sell ships *pendente lite*; but whether the sale be *pendente lite*, or after restitution or condemnation, the decree is alike conclusive, and cannot be enquired into. Nor is there a case extant, from the time of *Ch.* II. to the present day, wherein it can be found that a sale, under a decree of the Court of Admiralty, was ever impeached: on the contrary, there is a series of cases, standing uncontradicted and unquestioned, recognizing the jurisdiction of the Admiralty Courts, and their power to order an absolute sale of the subject matter of their adjudications. A distinction has been attempted to be made between the Instance Court and the Court of Prize, as it is called.—In point of fact, the Instance Court is a regularly constituted Court of the Admiralty, of permanent jurisdiction over the various matters already mentioned; whereas the Prize Court is temporary, and founded on a commission issuing at the commencement of every war, for the decision of questions of prize only.

The

1816.

ATTORNEY-GENERAL v. NORSTEDT.

The Judge of the Instance Court is generally named in the commission as the Prize Commissioner, but still it is a distinct jurisdiction; and there can be no reason for giving a greater or more binding authority to the decrees of the Court of Prize, than is due to the Instance Court; and, accordingly, the cases all go to establish that the sentences of the Admiralty Courts are equally conclusive, without any such distinction.

The first case which occurs, is that of *Hughes* v. *Cornelius(e)*. That was a case of trover, brought for a ship and goods; and, on the special verdict, there is found the sentence in the Admiralty Court in *France*, which was with the defendant;—and the Court adjudged, that "as they were to take notice of "a sentence in the Admiralty here, so ought they of "those abroad in other nations; and that they must "not set them at large again, for otherwise," (said the Court,) "the merchants would be in a pleasant "condition." Now that case goes to establish, that the Court of King's Bench will take notice of a decree of the Court of Admiralty at home; and the principle is then applied to a decree of a foreign Court of Admiralty. Nor is that principle confined to cases of prize only; for the Court goes on to ask, by way of illustration,—"Suppose a decree here, in "the Exchequer, and the goods happen to be car-"ried into another nation, should the Courts abroad "unravel this?" Now, a decree by a Court, having competent jurisdiction, whether it be the Court of

(e) 2 Show. 232.

Exchequer,

Exchequer, or whether it be the Court of Admiralty, is equally entitled to respect. We respect the decrees of other Courts, however unjust, and require them to defer to ours:—and shall we not respect them ourselves? While we prohibit the Customs from seizing a ship sold by a French Prize Court, as having incurred a previous forfeiture, are they to be permitted to do so, where the vessel is seized and sold by our own Court of Admiralty?

That case is reported by several other reporters. It is to be found in *Skinner*, page 59; and there it is stated, that the sentence of the Admiralty was produced under seal; and the Court would not suffer this verdict to be argued, but ordered judgment to be entered for the plaintiff;—for they said, that sentences in Courts of Admiralty ought to bind generally, according to the *jus gentium*;—and that was a peculiarly strong case; because, there the facts found by the special verdict, negatived those on which the sentence in the Admiralty Court was founded. And when *Holt*, Lord Chief Justice, had occasion to cite this case, in *Green* v. *Waller* (*f*), he said, "although the fact was found to be contrary to, and falsifying the sentence in the Admiralty of *France*, yet that sentence was held to bind the property of the goods."

That was the first case, in point of time, in which this question came under the consideration of the Common Law Courts; but that was suc-

(*f*) 2 Ld. Raym. 893. 935.

1816.

ATTORNEY-GENERAL v. NORSTEDT.

ceeded by several other cases, which are equally in point. *Ewer* v. *Jones* was a case in which the jurisdiction of the Instance Court happened to come in issue; and there, Lord *Holt* again referring to *Hughes* v. *Cornelius*, says, that the Court adjudged, that though the sentence of the French Admiralty Court were unjust, the property was altered. There is also the more recent determination of *Ladbroke* v. *Crickett (g)*, which is materially in point:—In that case the master (who was also owner) of a ship had had repairs done to her, for the payment of which she had been hypothecated, by way of bottomry. A suit being instituted in the Admiralty Court on that instrument, the vessel was seized, and decreed to be sold to satisfy the demand for repairs. Subsequent to the seizure, the plaintiff (Sheriff of *Surrey*) took the ship in execution; but the defendant afterwards sold the ship under a decree. The action was *trover* against *Crickett*, who was Marshal of the Admiralty; and the question was,—Whether there was jurisdiction in the Admiralty Court? which seemed to be admitted, when it was gone into; but Mr. Justice *Ashurst* said, in giving judgment,—"We only look to the sentence: it does not appear from thence that they proceeded without jurisdiction, and we cannot presume that they acted improperly:" And Mr. Justice *Buller* said,—"The party who applies for a prohibition after sentence, must show a nullity of jurisdiction on *the face of the proceedings*; therefore the plaintiff, in this case, would not go into evidence

(g) 2 T. R. 649.

at

at the trial to impeach the decree of the Court of Admiralty." By that case, it appears to be decided, that however good a previous title may have been, if the Marshal of the Admiralty be in possession under the decree of that Court, no *trover* lies against him: the Admiralty Court, having cognizance of the subject matter, are supposed to act throughout correctly in all their proceedings, which cannot afterwards be enquired into. All the cases on that point are summed up in the case of *Lothian* and others v. *Henderson (h)*. In the case of *Barnardi* v. *Motteux (i)*, Lord *Mansfield* says,—"The first principles are clear, and admitted: "all the world are parties to a sentence of a Court "of Admiralty. Here, there is a monition published "at the *Exchange*; and in other countries, at some "place of general resort; and any person interested "may come in and appeal at any time, if there have "been no laches; if there have, the time of appeal is "limited: but the sentence, as to that which is within "it, is conclusive against all persons, unless reversed "by the regular Court of Appeal: it cannot be "controverted collaterally in a civil suit." That is a broad, forcible, and comprehensive proposition.—It is further supported by the authority of the Privy Council, whose judgment was pronounced by the Master of the Rolls, in the case of *Kindersley* v. *Chace (k)*, who states it to be quite clear, that from the time of Lord *Hale* down to that period, it has been settled, that a sentence of condemnation

(h) 3 Bos. & Pul. 499. (i) 2 Doug. 580.
(k) Parke's Ins. 547 (7th ed.)

1816.

ATTORNEY-GENERAL v. NORSTEDT.

in a Court of Admiralty is conclusive. When it proceeds on the ground of enemy's property, it is conclusive that the property does belong to enemies, not only for the immediate purpose of such a sentence, but it is binding on all Courts, and against all persons. "This has been so clearly understood (his Honour adds), "that it was not even contro-"verted in the case of the Duchess of *Kingston*, "where the conclusive effect of all sorts of evidence "was so ably discussed: it was admitted that the "sentence of a Court of Admiralty, proceeding *in* "*rem*, must bind all parties,—must bind all the "world." Now certainly, in the Duchess of *Kingston*'s case *(l)*, there was not the slightest doubt thrown out but that the decisions of the Court of Admiralty, and the Court of Instance, which are all put together, were conclusive and binding, because they proceeded *in rem*. It was admitted, and there can be no doubt of it, that they would be binding upon all the world; and unless it be shown that there is an exception in favour of the Crown, this case cannot be sustained.

The defendant's Counsel also availed themselves of an opinion* expressed by Sir *Leoline Jenkins*, the

(l) State Trials.

* The case on which that opinion was given, was this:—A vessel having been carried into *Scotland* by a privateer, was sold under a sentence taking place there, and afterwards claimed by the first owners, who arrested her at *Newcastle*. The question in the Admiralty Court here was,—What was to be the effect of such a sentence, which was contended to be null?

the Judge of the Admiralty Court, in the time of *Charles* II., to be found in *Wynne*'s History of his Life, vol. ii. p. 762.

The next question is, on the competency of the

null? In Sir *L. Jenkins*'s opinion on it are found these sentiments taken:—"First, From the rules of the Civil Law, the ordinary remedy against a sentence is by way of appeal; every sentence, after the time limited to appeal from it, being to be taken *pro veritate*, or till it appear to be otherwise by the sentence of a competent Judge that shall reverse it. That we are not competent in this case is evident, in that there lies no appeal hither from *Scotland*.—Secondly, From the practice of Civil Law Courts, which ordinarily intermeddle not with, nor inspect, the merits of those sentences that are given without the limits of their jurisdictions. It is a ruled case, that one Judge must not refuse, upon letters of request, to execute the sentence of another foreign Judge, when the persons or goods sentenced against are within his jurisdiction; and if he do, his superior must compel him to it. Thirdly,—From the usage of the Western world, each sovereignty avoiding, as much as may be, to break in upon or interrupt one the other in their judicial proceedings, as appears, first, by the modern treaties, which do most of them provide, that persons wronged shall seek and pursue their remedies in law (not in their own homes, but) in those countries where the wrongs have been done them.—Fourthly, From the peculiar usage touching the property of ships, the Parliament of *Paris* hath determined that ships are not recoverable *jure postliminii*, when they happen to return from an enemy's possession to their true owner's country; and the laws of *Spain* and *Venice* do allow their property to be altered (which agrees not with the ancient Law of Nations), even in the hands of pirates, so as to vest legality in others that derive *bonâ fide* from them. Now, if the property of ships, in favour of public commerce, can pass without, a sentence seems not regularly to be void till the sentence itself be reversed by a competent authority."

1816.

ATTORNEY GENERAL v. NORSTEDT.

jurisdiction. As to the argument drawn against it from sales in the *West Indies*, although it was held by Lord *Ellenborough*, in the case of *Reid* v. *Darby*, that a sale by the Vice-Admiralty Court there was not good: that was because they had no jurisdiction over the subject matter; for, by the municipal laws and the constitution of that Court, it had no jurisdiction under the circumstances of that case. That decision, therefore, does not impugn the jurisdiction of the Court of Admiralty here to sell a *derelict*.

In the case of the *Betty Cathcart*,—which was carried by appeal up to the delegates, who unanimously confirmed the sentence of the Court below,—a ship had been seized by a *French* ship, and carried into *America*: it was decreed to be restored to the owners; from which there was an appeal. She was sold, *pendente lite*, in the Courts in *America* to a Mr. *Wenman* there, on behalf of the former *British* owner. The Judge of the Vice-Admiralty Court found, that by that he became possessed at once of this ship in trust for the *British* owner; but that the *British* owner was entitled to the privileges of a *British* ship, and that, carrying a cargo to a *British* settlement, he was not subject to confiscation, because he had not violated the laws. Now, if she had been an *American* ship, she must have been condemned; and that was a case of sale *pendente lite*.—A case was also cited by Dr. *Leasingtón*, in which he was of Counsel in support of the sale under a similar decree of the Court of Admiralty. That was the case of the *Experimento*. The *Experimento* was a *British* vessel, which happened to be in *America* on the commencement of hostilities

hostilities between *America* and this country: she was seized by the *American* Government. The *American* Government passed an act of Congress, by which all *British* vessels, which had been in the ports of the *United States* prior to a declaration of war, should be restored to their respective owners; consequently, the owners of this vessel were entitled to restoration under that act of Congress, and a claim was accordingly made on behalf of the *British* owners. By that act, the vessel ought to have been restored to the owners on payment of the expenses of the proceedings: but those expenses not being paid, she was, by decree of the Court, sold to defray them, and the balance of the proceeds was paid into Court, for the benefit of the owners. Under that decree, and the sale consequent thereon, she was purchased by *Spanish* owners, resident in *Amelia Island*, who brought her to this country. On her arrival here, she was arrested on the claim of the former *British* owners, and they alleged their former title—the decree of restitution in the Admiralty Court in *America*, under the act of Congress; and also that the sale was a fraudulent sale, the purchase-money appearing to be very small. The sole argument used on that occasion for the title of the *Spanish* owners was, the production of the decree of a competent Court of Admiralty; when the Court at once said, that it was not necessary to go further. The Court, on that occasion, said, that "a judicial sale may, and generally is, a disadvantageous sale; but did the sale take place under the "authority of a competent Court? There cannot be "a question about it. The Court of Admiralty of "*Savannah* had a right to do what this Court is in

1816.

ATTORNEY GENERAL v. NORSTEDT.

" the habit of doing—to issue a decree of sale for the " payment of the expenses incurred in adjudication. " There can be no doubt as to the competency of the " Court to order a sale for such a purpose. The " price appears small, but the Court will not enter " minutely into that consideration: it would be im- " possible to maintain the decrees of Courts, if they " were to be entered into in that way."

It was then denied that this was a sale between *Eberstein* and *Norstedt*, and that *Eberstein* was the seller, or that his former title had any thing to do with the title under which *Norstedt* now held. The mode of selling under a decree of the Court of Admiralty, has the effect of shutting out and destroying all previous titles. The purchaser has no power or means of investigating a title,—it is not open to his inspection. The former owner is no party to the sale; it is the Court of Admiralty which guarantees the title to the buyer, and upon the faith of that Court. That is universal practice, as is shown by the purchaser's never taking a title-deed of any kind from former owners, he taking merely a certificate from the marshal of the Admiralty, and nothing else; and it is the same thing in the Prize Court.

[The Court having asked how, in the case of a *British* vessel condemned, she is registered after such a purchase? it was said that, in that case, the Instance Court would take a copy of the former register, and get her registered over again, supposing her to be a *British* vessel, and she would then be registered as such. In the Prize Court, they are also

also entitled to have her registered, (except in the case of re-capture) under a particular statute, brought in by Mr. *Rose*.]

The case was put, of a vessel sold *pendente lite*, in a Court of Prize, where there should have been no final condemnation; yet it could not possibly be contended, that that ship, in the hand of a purchaser, would be liable to a former forfeiture. That is the general principle, and it stands unquestioned. To the arguments founded on the purchaser having a remedy over, it was answered, that this having been a purchase by a *British* subject, under a decree of the Court of Admiralty, if the vessel should afterwards be condemned for a prior forfeiture, no action could be brought against the former owner, because he not having been cognizant of the fraud, nor a party to the decree, (for the former owner has nothing to do with the sale) the defence to that action would be, that the defendant did not sell what was so purchased, under a decree of the Court of Admiralty. *Norstedt* therefore could not support an action against *Eberstein*, should the Court determine that this ship should be held to be forfeited.

Admitting it to be the general rule, that the forfeiture attaches the moment the act is committed, it would still be analogous with the common case of *debitum in presenti, solvendum in futuro*. Felons' goods, between the time of committing the felony and the time of conviction, if disposed of, for his own maintenance, would be protected in the case of a *bonâ fide* purchase: that is a case which was lately before the Court

1816.

ATTORNEY GENERAL v. NORSTEDT.

Court of King's Bench. But they have gone further, in the great Prisage Case in *Bulstrode(m)*, where this point is put. A termor is distrained for rent behind; afterwards he is attainted for felony, done before the distress taken. *Per Curiam.*—The King shall not have this distress as a forfeiture, unless he do satisfie the party who distrained, for this was lawfully taken *tempore captionis*; so that there is a case where, though the King would be entitled to the forfeiture, yet because it was lawfully taken *tempore captionis*, the right would attach only, subject to the claim of the party making the distress. There are several other cases in *Bulstrode*, where there is the same sort of law applied to the case of a lease, where the felony has been committed after the lease granted. These cases show, that the right of the Crown, by forfeiture, does not completely over-ride all other rights; and if adverse rights, founded on principles of common justice and equity, should have accrued subsequent to the forfeiture, they ought not to be permitted to be overthrown. That rule of justice is supported by authorities, and the practice of the Courts. Thus, in the case of the payment of bonds by an administrator, before seizure, or notice of the King's debt, that is held to be a good plea against the King, where his debt is not of record; but where the King's debt is of record, all the world are bound to take notice of that debt; and, therefore, such a plea would be bad: but this is not such a claim as is notice *per se*. So also in cases of Extents, where a proper assignment has been made before the Extent be taken out, the King's pre-existing debt is bound. If, then, the Instance Court

(m) 3 Bulstr. 17.

of

1816.

ATTORNEY GENERAL v. NORSTEDT.

of Admiralty has power to decree a sale, and in such cases as this; and if a decree of a Court of competent jurisdiction is conclusive, it cannot be brought into question, nor can the merits on which it proceeded, be re-discussed in any other Court but a Court of appeal, so specially appointed; and this Court would assume, on what it does not possess, appellate jurisdiction from that in which this decree was pronounced, if on this collateral question, it should entertain any objection which might be taken to the circumstances under which it was made; as, for instance, whether there were fraud and collusion among the parties to the suit, and whether the suit itself was merely proceeded in for the express purpose of doing what has been suggested.

Much stress was laid on the argument, that the proceeds in Court were responsible for the claims on the ship, and it was put, that the Crown should have required them to be paid to the Customs; and that whenever a claim of that description was made, it was always attended to; as for instance, in the case of Sir *Home Popham*, where the Court actually condemned the *Etrusco*, on a charge of illegal trading. So they would, no doubt, have done in this case, but the sale once decreed, even the right of the Crown is shut out.

The defendant's counsel then adverted to the cases which had been cited for the Crown, and contended that they furnished no decision applying in support of the positions assumed; that they were

1816.

ATTORNEY GENERAL v. NORSTEDT.

were differently circumstanced, and fell short of all that was necessary to raise, on that occasion, any of the questions now before the Court. All that was decided there by the Court, was, that under *the circumstances of those cases*, neither a seizure of the vessel by the Admiralty as a droit, nor her becoming *flotsam* after a forfeiture, could operate to purge that forfeiture. But among those circumstances, this is not to be found, that the Court of Admiralty had actually proceeded in the exercise of its jurisdiction, to decree the vessel to be sold, or that a sale, under that decree, to a third person, had taken place *, which are facts widely distinguishing those cases from the present.

In opposition to those authorities, (as far as they went) they cited the case of *Minnett* and *Heys* v. *Robinson (l)*, which was a motion by the plaintiffs for a prohibition to the Admiralty Court, then proceeding on a libel for wages, (due before the seizure) upon a suggestion that the ship had been seized for a forfeiture under the Navigation Act; and that claim was put in by the master, on the information filed by the seizor, to which the master pleaded the general issue; but

(*l*) Bunb. 121.

* It was also said, that some doubt had been thrown on that case in the *King* v. *Appleby* †, by *Thomson*, Baron, having said, that he had found on examination that it did not correspond with the record; but that his Lordship said, he did not recollect. It was suggested, too, that *George* Prince of *Denmark* being at that time Lord High Admiral, he had a right as against the Crown.

† 3 Anstr.

he

1816.

ATTORNEY GENERAL v. NORSTEDT.

he afterwards, and before trial, submitted and compounded, on which there was judgment *quod vas deliberetur, &c.* It was insisted, that the Act of Parliament had so altered the property of the ship, that by the seizure, submission to the fine and judgment, all precedent incumbrances were discharged. But the Court, (it is reported,) discharged the rule, on cause shown, though they admitted, that if there had been a condemnation, that would have been a good ground for a prohibition, and a discharge of all precedent incumbrances: on which the Reporter makes a *quere:* the fine being tantamount to a condemnation. That case shows, that a condemnation is necessary to supersede the jurisdiction of the Court of Admiralty. Now, if a sale had been ordered in that case, *pendente lite*, and the purchase-money brought into Court to answer demands existing against the vessel, the purchaser would surely have been protected; otherwise it must be held, that that which represents the ship might be used for one purpose, while the ship itself might be seized for another. But it can never be contended, that the same property may be seized and sold twice over, or *ad infinitum*; and that must be the consequence of holding the sentences of Courts competent to decree a sale to be not binding or conclusive. And that that rule should be solemnly established, mercantile policy, and the respect due to Courts, the fiscal rights of the Crown, and the security of property acquired by the subject, all combine to require.

It was further observed, that in the present case, the purchase-money was, after the sale, by the course

1816.

ATTORNEY GENERAL v. NORSTEDT.

course of the proceedings, brought within the power of the Crown, by having been paid into the registry of the Admiralty Court; and then also, the Crown's claim might have been made. The king's proctor, in his office of Admiralty, who was the party moving the suit, and continuing to prosecute it to the last, might have done so. The money may, perhaps, even now, be followed, but the ship should be secured to the purchaser. With respect to the confliction of claims between different departments of the Crown, that should not prejudice third persons; and, to the argument derived from other Courts not having power to bind conclusively all the world by their decrees, the answer is, that the proceedings of this Court, in such matters as are now the subject of discussion, are all *in rem*; whereas those of other Courts, in the instances put, are merely *in personam*. They direct *parties* to act as they think right; and, consequently, if any person who has an interest in the subject matter of dispute, be not before the Court, there can be no decree as to him.

In this case, Commissioners, named by the Court, are appointed to sell the property, and the only conveyance which the purchaser has, is a short certificate of the sale, setting forth the circumstances under which that sale was ordered, and he takes no further conveyance from the parties interested; whereas, in Courts of Equity, the course is to order the parties interested in the estate to be sold, to convey, and the Deputy Remembrancer does not profess to confer a title by his mere certificate, as the Marshal of the Admiralty does.

The

The proceeding being *in rem*, was also put, as an answer to the case suggested, of goods taken in execution by a sheriff.

[WOOD, *Baron*. If under an Extent against *A*, the goods of *B* should be seized by the sheriff, and specifically returned into this Court, and sold, in default of the person in whom the property is, claiming, they are bound.]

And that is the case in the Court of Admiralty, who do not affect to sell the property of *Eberstein*, or any one else;—they order a sale of property found, and brought in, (under circumstances enabling them to do so,) and they make the proceeds answerable for all demands; which demands, without a sale, could not be severally satisfied. The case was also put, of the ship being the property of the Crown, and sold to pay salvage due from the Crown; and it was asked, if the Crown could, after so employing the purchaser's money, seize the ship in his hands as forfeited?

[The question was then ably taken up, on the principle of the necessity of encouraging universal confidence among the different nations of the commercial world.]

Reasoning ultimately from the mischiefs inseparable from the doctrine which had been advanced in confirmation of this verdict,—the learned counsel insisted much on the injury to the government itself, in

1816.

ATTORNEY GENERAL v. NORSTEDT.

in point of revenue, which must necessarily result from defeating, by subsequent seizures like the present, the rights acquired by judicial sales; for thus the Crown would, by depressing the confidence of purchasers, and checking the facility of sale, decrease or destroy the value of its rights. Who would purchase an Admiralty droit, which would be always liable to seizure by the Customs for old forfeitures, of which no knowledge could be obtained, and against which, therefore, there could be no guarantee? and while, in cases of private sales being rendered nugatory by previous forfeiture, the purchaser would have a remedy over against the vendor, that, on the other hand, which ought to be (and usually is) a stronger ratification—a judicial sanction,—would have no other operation than to defeat that remedy; stripping the fair dealer of his security, and affording the offender impunity. Thus every man whose title is derived from the decrees of Courts, would have no claim to what he now considers his property, if the ship he has bought should ever have committed a forfeitable offence, and that, however remote a purchaser he may be; for the defendant, in the present instance, being the next immediate purchaser, is an accident, and does not affect the principle.

Then inverting the argument, they insisted, that no one object of the penal enactments against the offence of smuggling, would be answered by such a decision;—the guilty would not be deterred, the fair trader encouraged, nor the revenue advanced

vanced. For these reasons it was submitted, that the verdict of condemnation ought to be set aside, and entered for the defendant.

The Solicitor General replied. He observed, that the whole of the very ingenious argument which had been raised, was founded, and proceeded, on the assumption that the decrees of the Instance Court of Admiralty (in questions of salvage between the salvors and owners,) were equal to those of the Courts of Prize, whose decisions are necessarily, and, by the comity of nations, held to be binding on all the world. But even admitting that the definitive sentences of the Instance Court on a question of, whether droit of Admiralty, or not, were conclusive; here, at least, that question was not finally determined by a condemnation of the vessel as an Admiralty droit, which she certainly was not, under the circumstances of this case; for the order on which the sale was had, is merely interlocutory; and that divests at once all the cases which have been cited for the defendant, of application to the present. But no authority has been cited, in support of this extraordinary power of the Instance Court to sell the ship; altering thereby the right of property, and purging all previous forfeitures incurred by her, and that even (for the argument must go the whole length,) in the case of restitution to the owner being decreed. That Court is the competent judge, perhaps, of a salvor's claim; and they may order the ship to be detained for salvage, but not to be sold to pay it, without *the consent of all parties*, who would have had themselves

1816.

ATTORNEY GENERAL v. NORSTEDT.

selves an interest, however small, and so far a right to sell. Now none of the parties to this proceeding in the Court, could have had any right to sell, by reason of the previous forfeiture; and therefore could not consent, so as to effect a sale through the medium of the Instance Court. But even if that were so, then the other objection in the present case arises, that this was a mere interlocutory order of the Court, and really had nothing to do with the merits of the question before them. Where the Courts have held the decisions of other jurisdictions binding, it has always been confined to the points conclusively litigated.—Here there was really nothing litigated in effect; and there was no decision on the question of property, for that was never at issue; nor was the question of droit or no droit, prize or no prize definitively adjudged. The decisions of the Prize Court, undoubtedly, are held, in Courts of common law, of so much weight as to be conclusive on all questions of prize; and the common law Courts will not entertain inquiry of prize or not prize, without the previous interference of the constituted Courts of Prize;—but then the question of prize must be adjudicated, to render the sentence conclusive. The cases cited on that point, all turn on that, and therefore they are out of the question. That of *Ladbroke* v. *Crickett*, amounts to no more than that a ship seized by the Admiralty, to enforce payment for repairs, cannot be taken by a sheriff, under an execution, against the previous owner, at the suit of another creditor; and that the plaintiff cannot maintain *trover* against the Admiralty officer in possession.

He

1816.

ATTORNEY GENERAL v. NORSTEDT.

He denied that the Court of Admiralty (as such) had any jurisdiction, in cases of forfeiture, *within the kingdom*; although the Vice-Admiralty Courts in the *West Indies* had, under particular statutes, by which they were expressly constituted so far Courts of Revenue, but still, not *qua* Courts of Admiralty.

He then adverted to an opinion of Lord *Thurlow*, (when Attorney General,) that a sale, even in market *overt*, of a thing forfeited, would not so alter the property as to bind the Crown; but admitted that a felon might sell his goods and moveables, but that is because the Crown has no title till conviction. In cases of forfeiture, unless the decisions are wrong, the right attaches immediately; and it never has been heard of, that the right of the Crown, by forfeiture, is defeated by an adverse title acquired *subsequent* to the act of forfeiture. If such a special plea (of a subsequent title in a third person) were put on the record, to an information *in rem*, for a forfeiture of a specific thing, it would be absurd; and that, because it matters not, in such cases, in whom that property is at the time. The case of the King being bound by the provisional assignment, before an Extent issued, has been put; but in Extents, the lands of the debtor are liable to be seized, though sold a hundred times over; and that, also, may be said to be a case of hardship.

As to the argument used, of the ignorance of law in the owner of the offending ship, or even his own personal innocence of the offence, that may be well

1816.

ATTORNEY GENERAL v. NORSTEDT.

well addressed to the Court, or the Crown rather, in mitigation of severity, and is always attended to; but it is nothing like a defence in law.

Cur. adv. vult.

The Court enquired, Whether the Crown considered itself no party to the suit, in the person of the Procurator General:—and, Whether it insisted on the forfeiture vesting the property presently, with regard to the time of the offence being committed.

The Solicitor General answered the first question in the negative, and the last in the affirmative. And, to an inquiry,—of what subsequent proceedings had been had after the sale,—and whether the Crown received any thing under the claim of *derelict*;—it was answered, that the proceeds had been brought into Court, and the expenses of the Admiralty; the salvage, to the officers of the King's ship; and the balance, to the claimant, *Cowie* and Co., as agents for the party claiming the property, were decreed to be paid thereout; and that the Crown had received nothing.

22d July.

THOMSON, *Chief Baron*, now delivered judgment. His Lordship stated the substance, and object of the information: the latter, he observed, did not seem to be of any great value, having been appraised at the sum of 300*l.* only.

He also desired to be considered as laying great stress upon the circumstance of the ship having been libelled

libelled in the Admiralty Court, by the *King's Proctor* claiming her as *derelict.*

1816.

ATTORNEY GENERAL v. NORSTEDT.

In this situation (said his Lordship)—[*having finished his statement of the facts of the case previous to the suit*]—upon the application of the litigant parties (those litigating, I mean, for the salvage) and the owners, and with the consent of the Proctor for his Majesty in the Admiralty, a sentence was pronounced, directing the sale of the ship, and the produce to be brought into Court. In consequence of this, a writ issued from the Court of Admiralty, directed to certain persons to appraise the ship, and then to expose her to public sale: this was accordingly done, and she was sold. I should state that she was a foreign ship, a *Swedish* or a *Danish* ship, no matter which; but she was a foreigner. She was purchased on behalf of the original owner, who declined having any thing to do with her; and then the present defendant (who had been a clerk in his service, and succeeded him on his having declined business, as it is stated,) accepted the ship, and took the bargain upon himself. It was thrown out (but that was mere matter of statement and representation, and without any proof, I believe, whatever being brought forward to support it,) that this was all a juggle between the master and this clerk of the former owner, as well as the salvors, and all the others, to get this ship so sold, in order, if possible, by means of that proceeding, to get rid of, and to purge the forfeiture which the ship had before incurred. The vessel, however, was, in point of fact, sold, and the jury, as

1816.

ATTORNEY GENERAL v. NOTSTEDT.

I learn from the report of my brother *Richards*, who tried the cause, negatived every circumstance of fraud in that transaction. Then after she was so sold, and after the purchase-money was fairly paid, she was seized by an officer of the Customs, on behalf of himself and the Crown; that is, she was seized in the hands of the new purchaser, in order to proceed to a condemnation of her, for the original offence committed before the transfer of the property took place. Then the question is, Whether, under these circumstances, and notwithstanding the authority under which the vessel was sold, the ship still remains answerable, and is liable to forfeiture to the Crown?

[His Lordship then noticed the cases in *Parker*, cited for the Crown, which he read at large; but those decisions, he observed, did not go the length contended for.]

Now the distinction (continued his Lordship) between those cases, and the one before the Court, seems to be, that there, the subject which was to be forfeited, remained in its original situation. It had not been sold, or disposed of, nor had any thing been done to condemn it, as a right of Admiralty, before the seizure by the Custom-house officer; and, unquestionably, the forfeiture had been incurred by her importing those French goods, though she was also liable to be seized as a right of Admiralty, for coming under those circumstances into the port; but however, the claim of the Crown was there asserted before any act had been done to alter

alter the property, and in consequence of that claim having been so asserted, the prohibition went to stop the proceeding in the Court of Admiralty. The other case turns upon the same distinction I have already taken.

I think the learned Doctor, who argued this case, on the part of the defendant, contended very ably, and very satisfactorily, in my judgment, for the jurisdiction of the Admiralty in the Instance Court, as well as in the Prize Court. It will be borne in mind, that there is a distinction in the Court of Admiralty, and that there are two branches of its jurisdiction: the one judges of matters of prize; and the other (which is its general maritime jurisdiction,) includes, among a great number of articles of which it is its province to judge, the question of salvage upon ships brought in for that purpose. That Court proceeds, as the Exchequer does, in informations, *in rem*; the ship itself is liable to be sold under its proceedings, in order to answer the demands that are made upon it. It generally, I believe, happens that the ship is not ordered to be sold till after a definitive sentence upon the subject, and possibly not till after the quantum of salvage is allowed; but here, upon the application of all the parties, and with the consent of the Crown in this instance, (though not in its right as claiming the ship as a forfeiture, but in its right of claiming it as *derelict,*) a sale is ordered, and a sale does take place. Now, as to these judicial sales, there seems to be no reason for any distinction between such as are made under the authority of the Prize Court,

1816.

ATTORNEY GENERAL v. NORSTEDT.

Court, and such as are made under this clear jurisdiction of the Admiralty, in the Instance Court; and the effect of a sale, under either of them, is to vest in the purchaser the absolute property in the ship, inasmuch as it is sold for the purposes for which the suit requires it to be sold: whoever was entitled to the produce of that sale, might have come in and claimed it in the Court.

In the present case, before they proceeded to this sale, there was no prohibition, and, indeed, no seizure, had been then made; but if the seizure had been made before, it appears to me it would have been a good ground for their coming and praying a prohibition, as they did in the case cited, on the footing of the Crown having a right by forfeiture—a right prior to that which the other claimants had, and therefore prohibiting the proceeding there; at the same time, it seems to me to be clear, that the salvors, even in that case, would have been entitled to salvage; and if that were not paid, they would of course have been entitled to a sale, in order to make good that salvage, for whosesoever property that ship may be taken to be, still, they who meritoriously preserved it from destruction, would be entitled to compensation in the shape of salvage; but, however, that has not been done in the present instance. The jurisdiction of the Admiralty, therefore, undoubtedly did apply, in this case, before any notice was taken of the forfeiture incurred to the Crown, or of any intention in the Crown to assert its right to this forfeiture; and this judicial sale, as I call it, made by consent of all parties, still was a judicial sale; and therefore

therefore it seems to us, that the party purchasing under the authority of the Court, had a judicial title given him; which must secure to him the property, —the sale was made for the payment of the salvage, and for other purposes,—the money was brought into Court, the purchaser having fairly paid it;—and, consequently, we are of opinion that the claim of the Crown, now, to have this ship, after it has been so transferred, as forfeited by reason of the offence committed before this transaction of the sale took place, is not at all well founded. The jurisdiction of the Court of Admiralty was explained to us, in a very luminous manner, by the leading advocate for the defendant, and with great candour and ability.

This case was brought on (which was somewhat irregular) in the way in which it now stands, by agreement between the parties. In point of form, the only issue that was joined upon the record, between the parties, was,—Whether the ship had incurred a forfeiture? And, perhaps, strictly speaking, upon that issue this question of the alteration of property between the act of forfeiture and the seizure, could not have arisen; but it was stated, and the Court took it up upon that, that it was agreed that all strictness of form should be waived, and that it should come on as if the question had been brought forward in the proper shape. Probably, the proper way would have been, for the defendant to have applied for leave to plead the subsequent facts of the actual judicial sale, and the purchase by the defendant. If that had not been sufficient, the Attorney General might

1816.

ATTORNEY GENERAL v. NORSTEDT.

might have demurred, and thus the matter would have been brought regularly before the Court. That, however, has not been done; and therefore we will dispose of it according to the agreement of the parties, that this should be considered as a decision upon the point arising out of the circumstances which have taken place, without regard to the form in which it comes before us; and, upon the best consideration we can give to the case, we are of opinion, that this claim of the Crown is not well founded; and that this ship is not now liable to the forfeiture she is charged to have incurred before the judicial sale.

We therefore make the

Rule Absolute.

END OF THE SITTINGS AFTER TRINITY TERM.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

AND

EXCHEQUER CHAMBER.

MICHAELMAS TERM,

57 GEO. III.

MEMORANDA:

IN the preceding vacation, Mr. Serjeant *Onslow* was promoted to the degree of King's Serjeant.

Samuel Marryatt, of the *Middle Temple*, and *John Gurney*, of the *Inner Temple*, esquires, were appointed of his Majesty's Counsel in the Law.

1816.

Friday, 8th November.

MILLS *v.* ELTON.

A trader being informed, *by the attorney of his petitioning creditors*, that he has delivered a warrant to arrest him to a sheriff's officer, who is seeking him for the purpose of executing it; and is advised by the same attorney to repair to his office, *to avoid the publicity of being arrested in the street*; which he does, and remains there a considerable time: —held not to have committed an act of bankruptcy within the meaning of the statutes; so as to defeat an action against the sheriff, by a judgment creditor to recover the proceeds of his goods, taken and sold under a *fieri facias*, sued out since the supposed act of bankruptcy.

THIS was an action against the Sheriff of *Devon*, for a false return. The defendant had levied, on the 25th *September* 1815, 1,095 *l.* 7 *s.* 9 *d.* on the goods of *William Shiles*, against whom the plaintiff had sued out a writ of *fieri facias*. On the 8th *October* following, the Sheriff had notice of a commission of bankrupt having been issued against *Shiles*, under which he had that day been declared a bankrupt, on an act of bankruptcy alleged to have been committed on the 16th *September*. He then took an indemnification from the petitioning creditors, for returning *nulla bona* after the sale of the goods taken in execution. The question on the trial was, therefore, whether an act of bankruptcy had been committed on that day by *Shiles*.

The facts adduced to prove the act of bankruptcy, which was the defence to the present action, were these. *Cox*, the attorney of the petitioning creditors, (and who was called as a witness on the trial) had sued out a writ, on their behalf, against *Shiles*, on which a warrant had been delivered to the sheriff's officer. *Cox*, meeting *Shiles* in the market-place, apprized him of it, and recommended him to come to his office, to avoid the publicity of being arrested in the street, which he did, and expressed himself obliged to *Cox* for his civility. While he was at *Cox*'s office, he sent a message

a message to one of the plaintiffs to come to him, for the purpose of making some arrangement, who promised to meet him there in half an hour. In the mean time, *Shiles* asked if he could take the opportunity of going out on some other business which he had, when *Cox* observed, that as the officer had the writ in his possession, for the purpose of executing it, he would most probably be arrested if he did; and that he had no authority from his clients to prevent it. Upon which, the witness sat down again, and said, "Then I will not go out," and remained in *Cox*'s office till three o'clock, and then went away.

On this evidence, Mr. Justice *Parke* directed the jury to find a verdict for the plaintiff, ruling, that what had been proved did not amount to an act of bankruptcy; distinguishing this case from *Chenoweth* v. *Hay* (*a*), inasmuch as it appeared, in the present instance, that *Shiles* had not kept out of the way to prevent the arrest taking place; but that it might be done in a less public manner, and not in the street; observing, also, that the act was the effect of a recommendation by the attorney of the petitioning creditors; and the jury, in consequence of the learned Judge's direction, found a verdict for the plaintiff.

PELL, *Serjeant*, now moved for a new trial, on the authority of the case of *Chenoweth* v. *Hay*,

(*a*) 1 M. & S. 676.

1816.

MILLS v. ELTON.

where it was ruled that it is not necessary that the plaintiff be actually delayed by the act of bankruptcy: for that the mere possibility that the act might so operate, was sufficient to bring it within the meaning of the statutes.—Here, the insolvent was concealed from the officer, knowing that he was in search of him, and was actually prevented from going out about his common business by that apprehension; the attorney having no authority to prevent the arrest. The case of *Gimmingham* v. *Laing (b)*, also decides, that the statutes were meant to extend to any evasion of creditors, and that any absenting, with a view to delay, would constitute an act of bankruptcy.

Per Curiam.—Under all these circumstances, there has not been such an act of bankruptcy committed by *Shiles*, as will defeat this action.—Had *Cox* not been the attorney of the petitioning creditors, the case would, perhaps, have borne a different complexion. As it stands, we see no ground for granting the rule.

Rule refused.

(b) 2 Marsh. 240.

IN

IN THE EXCHEQUER CHAMBER.

The KING (on the prosecution of Messrs. HEATHCOTE & BODEN) *v.* TOWLE, BADDER & SLATER.

1816. *Wednesday, 13th November.*

An indictment on the 43d *Geo.* III. ch. 58, charging in one count, that *A. feloniously*, wilfully, maliciously and unlawfully, and of his malice aforethought, did shoot at *B.*, with intent *feloniously*, &c. to kill, &c.; and that *C* and *D.* were then and there aiding and abetting said *A.* the felony aforesaid, in *manner and form aforesaid*, to do and commit, against the form, &c.; and in another count, charging the act of shooting on a person unknown, in the *same words* as before; and that all three, *A.*, *C.* and *D.*, were then and there aiding and abetting him the felony aforesaid, *in manner and form aforesaid*, to do and commit (*omitting the word* FELONIOUSLY to the aiding and abetting);—held good *on the whole*, notwithstanding that omission: the statute having made aiders and abettors principal felons; although the Jury, having found *A.* guilty generally and acquitted the others, afterwards expressly negatived that *A.*'s was the hand that fired.

THE prisoners were indicted at the last Summer Assizes at *Leicester*, before Mr. Baron *Graham*, on the stat. 43 *Geo.* III. c. 58 *, for shooting at *John*

* By Sect. I. it is enacted, "That if any person or persons, from and after the first day of *July* in the year of our Lord one thousand eight hundred and three, shall, either in *England* or *Ireland*, wilfully, maliciously, and unlawfully shoot at any of his Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of his Majesty's subjects, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or shall wilfully, maliciously, and unlawfully stab or cut any of his Majesty's subjects, with intent in so doing, or by means thereof, to murder, or rob, or to maim, disfigure, or disable such his Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty's subject or subjects, that then and in every such case the person or persons so offending, their counsellors, aiders and abettors, knowing of and privy to such offence, shall be and are hereby declared to be felons, and shall suffer death as in cases of felony without benefit of clergy: Provided always, that in case it shall appear

1816.

The KING v. TOWLE and others.

John Asher. The indictment consisted of six counts:—The first count stated, that *James Towle*, on, &c. with force and arms at, &c. to wit, with a certain pistol loaded, &c. *feloniously, wilfully, maliciously, and unlawfully, and of his malice aforethought*, did shoot at *John Asher*, a subject, &c. with intent in so doing, and by means thereof, *feloniously*, &c. to kill and murder him said *Asher*:—and that *Badder* and *Slater* were then and there aiding and abetting the said *Towle, the felony aforesaid, in manner and form aforesaid*, to do and commit, and were knowing of and privy to the committing of the said felony, against the form of the statute, &c.

The second count alleged, that the act was committed with intent to disable him.

The third count laid the offence with intent to do and inflict upon him a grievous wound, such

appear on the trial of any person or persons indicted for the wilfully, maliciously and unlawfully shooting at any of his Majesty's subjects, or for wilfully, maliciously, and unlawfully presenting, pointing, or levelling any kind of loaded fire-arms at any of his Majesty's subjects, and attempting, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or for the wilfully, maliciously, and unlawfully stabbing or cutting any of his Majesty's subjects with such intent as aforesaid, that such acts of stabbing or cutting were committed under such circumstances as that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, that then and in every such case the person or persons so indicted shall be deemed and taken to be not guilty of the felonies whereof they shall be so indicted, but be thereof acquitted."

wound

wound then and there being a grievous bodily harm.

The fourth, fifth, and sixth counts, charged the same acts, *in the same words*, to have been committed, with the like several intents, by some evil disposed person to the jurors unknown; and that all the three prisoners were then and there (omitting the word feloniously) aiding and abetting, &c. the said unknown person, *the felony aforesaid, in manner and form aforesaid, to do and commit*, and were then and there knowing of, and privy to the committing of the said several felonies, against the form, &c.

The jury acquitted *Badder* and *Slater*, and found *Towle* guilty generally. The learned judge then put it to the jury, whether *Towle* was the man who fired; and they found that he was not. On that finding, the objections were taken; first, that the three last counts of the indictment were bad, for the omission of the word "feloniously" in that part of those counts which went to affect the prisoner *Towle*; and, secondly, if that were so, that no judgment could be entered up on the three first counts, because the jury had negatived the charge to which they applied, by finding that *Towle's* was not the hand which fired.

The judge pronounced sentence on the prisoner, but respited the execution of it till the opinion of the twelve judges should be taken. The case now came on for argument, when

1816.

The KING v. TOWLE, and others.

Denman, in support of the objections, submitted (taking the second first) that there could be no charge of felony framed, without employing the word 'feloniously' in the indictment;—that that word was indispensably and essentially necessary to mark the felonious intent with which the act was committed, and to characterise the offence charged —that no other word could be substituted to supply the omission—and that such words as wilfully, knowingly, or any other, were insufficient; because it would be still doubtful what offence the will and knowledge constituted.

The rule of pleading is, that the offence itself must be alleged, and the manner of it, and both in apt and technical words:—"An indictment of felony," says Sir *M. Hale*, (2 Hist. P. C. ch. 25, s. 7, p. 184,) "must always allege the fact to be done *felonicè*; "an indictment of burglary must lay the offence "to be *felonicè et burglariter fregit et intravit*; "an offence of high treason must be laid to be "done *proditorie*; petit treason *felonicè et pro-* "*ditorie*." Then (citing *Stamf.* P. C. p. 96. a.) he proceeds, "*A.* is indicted, *quod furatus est unum* "*equum*; it is but a trespass for want of the word "*felonicè*." Of so great importance, says the same authority, are the words of art, that if by omission, or misplacing of letters, they become insignificant, they vitiate the indictment; as *burgariter* for *burglariter*, *feloniter* for *felonicè*, *murdredavit* for *murdravit*. (Ib. ch. 24, p. 169—187. *Stanf.* P. C. 94. b.) —In 2 *Hawkins*, (P. C. 23, s. 73. p. 258,) it is said, that "no periphrasis or circumlocution whatever,

will

"will supply those words of art which the law has "appropriated for the description of the offence; "from whence it follows that an appeal of death "cannot amount to a charge of murder, without "the word *murdravit*," and that however particularly the circumstances and malice be set forth. Nor of rape, without the word *rapuit*; of larceny, *cepit*; of mayhem, *mayhemiavit*: nor would any of those appeals be sufficient, without the word *felonicè*.

[ELLENBOROUGH, *Ld. C. J.* It cannot be disputed that periphrasis is not sufficient. But it will be contended, that the word 'feloniously' is virtually inserted, and without any periphrasis, here, because the unknown person is alleged to have committed a felonious act *feloniously*; and the prisoner is then charged with aiding and abetting the said unknown person *to do and commit the felony aforesaid, in* MANNER AND FORM AFORESAID, and to have been knowing of and privy to the committing of the said felony.]

That would be still liable to the objection of requiring the aid of construction by reference, and calling in former words, which is never admitted in criminal cases; nor is there any instance of that sort. It would clearly be insufficient, in an indictment against a receiver of stolen goods, to refer to the felonious act of stealing, without also stating that the stolen goods were feloniously received.

[BAYLEY, *J.* You do not cite any authority for that.]

The

1816.

The KING v. TOWLE and others.

The rule is clear, that nothing can be left to intendment; and all the precedents are uniformly framed on that rule. In 2d *Hawkins*, P. C. c. 29, s. 17, p. 445, it is said, "it doth not seem necessary, in any indictment or appeal against a man as accessory before the fact, to set forth the special manner by which he abetted it, but only to charge him generally, *quod felonicè, &c. abettavit.*" The word *felonicè*, therefore, is more necessary in charging an abetting, than the setting forth the special manner of such abetting.

In many cases of charge of felony, the facts alleged might be true, and yet no felony may have been committed. Thus, if a constable, acting with his staff of office, were to abuse his authority, and were to call upon *A.* to assist him (which *A.* would certainly be bound to do) and death were to ensue, the constable would be guilty of murder; but *A.* would not; and yet *A.* would be aiding and abetting an act which was felony in the constable; but he would not be privy to what was passing in the mind of the constable, and which gave the act its felonious essence.

[ELLENBOROUGH, *Ld. C. J.* Here a felony is laid to have been committed, and the prisoner to have been knowing of and privy to the committing of the felony. That includes the motives under which the felony was committed, and gives to the guilty privity the quality of the principal act.]

The

The Counsel then put the case of a man labouring under mental derangement, doing an act which would, in a sane person, amount to a felony, and submitted, that in cases of felony, particularly where the offence was created by statute, judges were not *astute* in deducing inferences. This indictment could not be true, unless felony had been committed; still the technical words, which the law requires to be introduced for the certainty of charge, can never be dispensed with, and that *(in favorem vitæ)* even though the act be clearly a felony.

It was then contended, that if the three last counts were bad, the prisoner could not be convicted on the three first, because he was there charged in terms with the act of shooting, which was expressly and distinctly negatived by the jury. In certain cases, a person aiding and abetting, may be said to be a principal, under circumstances specially found, by the jury charging him with doing the act. That was so held in *Wills's* case *(a)*.—So also in the *King* v. *Borthwick (b)*, and the *King* v. *Francis (c)*; but in the present case, neither was the shooting found, nor any other equivalent circumstances. The two offences created by this statute, are entirely distinct, though the punishment is the same in both. The only authority inclining against this doctrine, is to be found in *Foster (d)*, where it is said, that in the case of murder, the mortal stroke, though given by one, is considered, in the eye of the law, as given by every individual

(a) East, P. C. 414.—Starkie, Cr. Pl. 400.
(b) Doug. 207. *(c)* Str. 1015.
(d) C. L. 351. 3d ed.

present

1816.

The KING v. TOWLE and others.

present and abetting, the person actually striking, being only the hand or instrument by which the others struck. It is further said there, that if the indictment charged that *A.* gave the mortal stroke, and *B.* and *C.* were present, aiding and abetting; if it cometh out in evidence that *B.* gave the stroke, and that *A.* and *C.* were aiding, the proof would sustain the indictment.

[GIBBS, *C. J.* Independent of the authority of *Foster*, it is a doctrine no one can doubt, that, in murder, whoever gives the blow, all present are guilty: for the act of one is the act of all.]

But there, the offence is *malum in se*, and a life must be lost, and therefore the principle of the common law applies.—Here, no life has been lost, and the impunity of the common law, in such a case, is provided against by statute, and by that alone the felony is created; the statute must therefore be strictly followed in laying the charge, and the whole charge precisely proved. Were it otherwise, a man might not know what he was called upon to answer, or might be convicted of a crime which he did not come prepared to defend.

It was then urged, that the cases of shooting were to be governed by the decisions on the statute of stabbing; and the authority of *Foster (e)* was again resorted to, to show how strictly the statutes which took away clergy are to be construed; so much so, that aiders and abettors were, in the case of the *King* v. *Page* and *Harwood (f)*, admitted

(e) C. L. 355. (f) Aleyn, 43.—Stiles, 86.

to

to their clergy; and the statute (1 *Jac.* I. ch. 8.) was held to extend only to such as actually made the thrust, not to those who, in construction of law, might be said to make it: and that is a strong case, for the offence was felony at common law.

[ELLENBOROUGH, *Ld. C. J.* That statute looks only to the individual act.

GIBBS, *C. J.* No argument can be drawn from the statute 1 *Jac.* I. c. 8, in the present case, because that statute was passed against the very hand which struck the blow, and that only.—The words are,—"every person which shall thrust or "stab." Whereas, by the statute now under consideration, all counsellors, aiders and abettors of the crime, though not actually present, are made felons, and no mention is made of those who are present.]

The act now in question is very analogous to the statute 3 *Hen.* VII. c. 2, *de muliere abducta*; by which, says Lord *Coke (g)*, "not only the takers but "the procurers, abetters of the felony, and receivers "of the woman, knowing the same, are all adjudged "as principal felons; the like whereof we find not "in any other statute." Yet in Lady *Fulwood's* case *(h)*, who was indicted on that statute, with other persons, for aiding and abetting in the county where the marriage took place; and some of the same persons were also indicted in another county, from whence the woman was carried; a distinction was taken and recognised, as to the latter not having

(g) 3 Inst. 61. *(h)* Cro. Car. 482, 484, 488.

been

1816.

The KING v. TOWLE and others.

been guilty of a felony within the statute. Where aiders are made principals, the indictment always describes the fact as it actually occurred, or the greatest injustice would otherwise ensue. For thus, persons charged as accessories before the fact, might be convicted on a case made out against them in evidence as principals; because, their defence resting on quite a different footing from the charge, they might be indicted for one offence, and convicted of another, from mere want of preparation;—and thus, a man might be convicted of shooting a person whom he never saw, though on a charge of counselling the act. Such are the evil consequences which would arise from not adhering to the terms of the statute, whereby distinct degrees of offence are created. The same observation applies to the Coventry Act *(i)*, on which this act was framed. The indictment on that act, always alleges, that one party cut, and that the others aided and abetted;—it did not charge all generally, but each with committing the appropriate offence. By the Black Act, (9 *Geo.* I. c. 22,) persons maliciously shooting, were made felons, without benefit of clergy. In the *Coalheaver's* case *(k)* it was held, that aiders and abettors might be found guilty as principals; but the statute creating the felony, with which they were charged, was silent as to aiders and abettors, and the common law took its course. In the present case, the statute on which the indictment proceeds, has made the aiding and abetting a distinct offence from the principal act, although of the same degree as to the

(i) 22 & 23 Car. II. *(k)* Leach, Cr. L. 76.

punishment.

1816.

The KING v. TOWLE and others.

punishment. It was learnedly questioned by Mr. *J. Foster*, in *Midwinter* and *Sims's* case *(l)*, whether that statute, on which they were indicted, (the Black Act,) could be extended to aiders and abettors, so as to oust them of their clergy; and the same doubts are entertained in subsequent cases, to be found in *East*, (Cr. L.) He stated, in conclusion, his general proposition to be, that wherever an act of parliament furnishes a description of the person intended to be brought within it, the charge must be stated and proved to accord with the law and the fact; and that if it be not, no inference or implication can help it. Here, that had not been done, because the second species of offence, (aiding and abetting,) of which alone the prisoner had been convicted, had not been laid to have been done *feloniously*; and therefore he submitted, that it had not been brought within the act. And of the first and larger offence (the actual shooting) the prisoner had been, in point of fact, acquitted, by the subsequent express qualification of their verdict by the jury.

Reynolds, for the Crown, admitted the necessity of employing apt terms of law in indictments of felony; but he contended, that in the present case the verdict recorded was, in effect, a verdict of guilty generally, notwithstanding what passed afterwards as to the qualifying answers of the Jury to the questions of the Judge, which he contended were wholly immaterial facts as affecting the law of the case. He submitted, that the whole of each count must be taken together as forming one entire count,

(l) Foster, C. L. App. 415.

and

1816.

The KING v. TOWLE and others.

and as uniting the former part, in which the word 'feloniously' occurred, with the latter, in which it did not, thereby supplying the omission, by the connection of the latter with the former part. The charge was, that the act (of shooting) had been *feloniously* committed by certain persons, and that the others were aiding in the felony aforesaid, in *manner and form aforesaid.*

In the case of the constable, put by the other side, the person assisting him would not be wilfully aiding and abetting the commission of the *felony*, because the felonious intention (the consenting mind) would be wanting; but that is not so here, because the indictment distinctly alleges all that is necessary to constitute the felonious offence, and adopts all the necessary terms.

The word 'feloniously' is certainly to be found in most precedents of indictments for felony; but it does not therefore follow that its *repetition* is indispensable or necessary: that must always depend on the particular case. In *Heyden's* case *(m)*, the jury on the coroner's inquest found "*Quod* Jacobus Heyden *de* S. *&c.* T. M. W. M." (and several others) "*quarto die*, &c. *ex malitiis suis præcogitatis felonicè ut felones dictæ Dom^e Reg^e in dict.* Edw' Savage *adtunc & ibidem insultum et affraiam fecerunt et quod præd'* Jacobus Heyden *cum quodam gladio valor', &c. præfatum* Savage *felonicè percussit* et *dedit eidem* Edwardo *adtunc et ibidem unam plagam mortalem super sinis-*

(m) 4 Rep. 41.

"*tram*

1816.

The KING v. TOWLE and others.

"*trum genu, &c.*" On that finding, it was objected that the indictment did not say that Heyden "*felonicè et ex malitiâ suâ præcogitatâ dedit pla-*"*gam, &c.*;" but as the conjunction *et* coupled the sentences together, so that the words *felonicè, &c.* first mentioned, referred to all the subsequent verbs, it was held sufficient.—In *Mary Nicholson's* case *(n)*, also, it was decided, that an indictment was not bad for not repeating the word 'feloniously' in the allegation of the *delivery* of the poison to the deceased. The last three counts, therefore, he submitted, were well sustained.

It was then urged, that on the three first counts also, *Towle* was properly convicted; for he must be considered, in point of law, to have fired the pistol, and therefore was a principal in the first degree under the statute, and the verdict must be taken to be a general verdict of guilty, convicting him of the whole charge, and that, notwithstanding the subsequent and incidental finding of the Jury, after they had given their verdict, that his was not, in point *of fact*, the hand which fired: he was indicted both as principal and accessory, and might have been convicted as either. In 2 *Hawkins*, P. C. c. 23, of Appeals, sect. 19, p. 236, it is laid down, "That it is in the election of the plaintiff to "declare against him who actually gave the wound, "as the principal offender, and against those who "abetted him as accessories, or against them all as "principals;" and in sect. 76 of the same chapter,

(n) 1 East, P. C. 346.

1816.

The KING v. TOWLE and others.

it is said to be in the election of the plaintiff to suppose, in his declaration, that every one of them did the fact; because, in such a case, the act of one is, in the judgment of law, the act of all: or, to show the special manner of the case as in truth it was, and set forth the fact to have been done only by the person who did it, and the others to have been his abettors, &c. Here the prisoner was charged both ways.—In *Benson* v. *Offley* and *Lippon* (*o*), where *A.* was charged with giving the wound, and *B.* with being present, aiding and abetting, a verdict finding the facts inversely, was held good, because both were principals, and equally guilty; and it was added, that an indictment ought to be as certain as a count in an appeal. To the same point he cited 1 *Hale*, (H. P. C.) 437,—*Mackalley*'s case (*p*),—the *King* against *Gibson* (*q*),—and *Plowden*, 98.—As to *Wills*'s case (*r*), which had been cited for the prisoner, that, it was argued, operated rather against him; because it confirmed the case of the Coalheaver's, which was on a statute wherein aiders and abettors are not mentioned, and showed that any of the associates of the person shooting were equally guilty. As to the doubts entertained by Mr. Justice *Foster*, in the case of *Midwinter* and *Sims* (*s*), who differed from all the rest of the Judges, the reason given is, because aiders and abettors are not mentioned in the act which created the felony; and if, notwithstanding, that indictment was held

(*o*) 3 Mod. 121. 2 Show. 510. S. C.
(*p*) 9 Rep. 67.
(*q*) 1 East, P. C. 413.
(*r*) 1 East, P. C. 414.
(*s*) Fost. App. 415.

not

1816.

The KING v. TOWLE and others.

not to be bad, *à fortiori* must this be good which is on a statute where aiders and abettors are in fact expressly provided against?—Whether therefore, on the present indictment, the prisoner were charged with actually firing the pistol, or with being present, aiding and abetting the person actually firing, it is not necessary that the allegation should be strictly according to the fact: it would be sufficient to support a verdict of guilty, if it bring the offender within the statute which expressly makes the aiders and abettors principal felons.

Denman, in reply, insisted on his former arguments. And, in answer to the cases cited, observed, that in *Heydon*'s case, and that of *Mary Nicholson*, the word *felonicè* was in fact introduced, and in the very counts; and the question in those cases was merely, whether the word, although so introduced, ought not to have been *repeated?* *—and it was held, (as was obvious,) that the conjunction carried it through all the rest of the count, which was entire and undivided; and not as here, consisting of distinct branches, and charging distinct offences. In the first of those, it charged, that the "prisoners "*felonicè affraiam facerunt*, et *quod Heydon* "*gladium tenebat* adtunc *et* ibidem *præd'* S. "felonicè *percussit*, et [*felonicè subaudiendum*] "*dedit eidem* Edwd. adtunc *et* ibidem *unam pla-*

* In *Heydon*'s case, too, (it is observable,) the word '*felonicè*' is also used in the *last* count of the same inquisition, which charges other persons with being present, *aiding* and *abetting*. The count runs—"*Et ulterius præd. Juratores, &c. dicunt quod* "*præd.* T. M. & W. M.—tempore feloniæ & *murdred præd.* in "forma præd. fact' *scilicet, &c.* felonicè *fuer' presentes cum* "*gladiis, &c. tunc et ibidem auxiliantes assistentes, &c. &c.*"

1816.

The KING v. TOWLE and others.

"*gam mortalem.*" So in the other case, the indictment (in the same count, and applying to the same charge and person) alleged, that "*Mary* "*Nicholson* did *wilfully, feloniously, and of her* "*malice aforethought*, mix poison with flour, &c. "*and* the said flour so mixed, &c. did, with *the* "*intent aforesaid, then and there* deliver," &c.— Here, the count consists of two distinct branches, involving distinct offences, and charging distinct persons, and therefore they require distinct allegations; for there is no such connection, either in matter or manner, as can admit the two sentences or the two charges to unite, or give to either of the latter, even by reference, any of the terms which qualify the former.

All the precedents negative such a mode of framing the count in practice, for not one indictment, charging a felony, can be produced, wherein the word 'feloniously' has been omitted; nor would it be proper or safe, that such laxity should be allowed in criminal pleading. He again insisted on the distinction taken between such offences as were felony by common law, and such as were made so by statute. He denied that the act itself, of firing the pistol, having been negatived by the Jury, was immaterial in a statutable offence.

GRAHAM, *Baron.* In my charge to the jury, I said, that I considered the persons present, aiding and abetting, as principals.

GIBBS, *Chief Justice.* The error seems to be in taking up the argument on the answers returned by

by the jury, without preserving a reference to the object of the questions.

1816.

The KING v. TOWLE and others.

ELLENBOROUGH, *Lord Chief Justice.* Suppose the jury had returned the same answers, and this indictment had consisted of the first count only?

The sentence was afterwards carried into execution.

1816.

Friday, 15th November.

TURNER and another *v.* CALVERT and others.

MARTIN moved, pursuant to notice (two days) that the plaintiffs might be at liberty to withdraw the replication filed to the answer of *Charles Dignum*, one of the defendants, and re-amend their bill, by striking out the names of the defendants, *R. Ladbroke* and *E. Phillipps*, and otherwise, as they should be advised, upon payment of 20*s.* costs to *Dignum* in respect thereof, and without costs as to the other defendants in the cause, amending their office copies of the bill.

After a plaintiff has twice amended his bill, and filed a replication for cause against a second order *nisi* to dismiss, as against a defendant who has not caused delay, the Court will not permit the replication to be withdrawn for the purpose of further amending the bill, by striking out the name of such defendant, and in other respects: for they will set bounds to dilatory proceedings.

Dauncey and *Raithby* showed cause, stating, that the bill was filed *Easter* Term 1811, that defendant, *Dignum*, answered *January* 1812, and on 26th *February* submitted (to save expense and time) to answer exceptions—that in *November* following (just before *Dignum* would have been entitled

1816.

TURNER and another v. CALVERT and others.

to move to dismiss) plaintiffs obtained an order to amend, on payment of 20 *s.* costs, which amendments *Dignum* answered in *May* 1813, he having in the mean while obtained time, on the ground of ill health—that in *December* following (18th) plaintiffs obtained another order to amend, paying 20 *s.* costs, which was not served till the 2d day of *Hilary* Term (24th *January* 1814) to which *Dignum* also filed his answer 6th *May* following—that on the 24th *March* next, *Dignum* obtained an order *nisi*, for dismissing the bill against him, with costs. The plaintiff then showed for cause, that some of the other defendants had filed insufficient answers, the exceptions to which had been allowed; and that such defendants were in contempt for not putting in further answers, due diligence having been used on part of plaintiffs, on which the order was discharged. *Dignum*, (that plaintiffs might have sufficient time to get in the answers,) did not afterwards take any proceedings towards dismissing the bill, as he might long before have done, till last *Trinity* Term, when, understanding that the answers had come in, he then obtained an order *nisi*, and the plaintiffs, at the Sittings after that term replied (for cause).

Under these circumstances the defendant's Counsel sumbitted, that such proceedings were merely vexatious, and had for their sole object to harass and delay the defendant in a suit which had already subsisted nearly six years, during which time the plaintiffs had twice amended, paying the defendant

1816.

TURNER and another v. CALVERT and others.

dant 40*s.* towards his costs, which amounted, in fact, to nearly as many pounds; and that if such proceedings were permitted, the suit might yet be prolonged indefinitely—that the bill had already been dismissed with costs as against *E. Phillipps*, and the Court had refused an application to reinstate him.

Martin, in support of the motion, contended, that it was almost of course, as it certainly would have been, if a replication had not been filed,—that all the delay and expense had been caused by those of the defendants who had sent in insufficient answers.

Per Curiam.—There certainly should be some limit to amendments; and there must, at some time, be an end put to delay. We must, therefore, refuse the application.

Motion refused.

1816.

Friday, 15th November.

KENSINGTON and others *v.* WHITE, CHALMERS and COWIE.

5 My Hr 160
9 Sem. 19.

A bill filed to restrain a plaintiff at law from proceeding on five different policies of insurance, effected on different ships, between the same parties at the same time, is not demurrable for multifariousness. —p. 167.

THIS was a motion on the part of the plaintiffs, for a commission to examine witnesses at *Amsterdam*, returnable without delay, with all usual and necessary directions; and also a duplicate and triplicate of such commission, if necessary.—And that the injunction issued in this case, to restrain the defendant *White* from further proceedings at law against the plaintiffs, might be continued until the return of such commission.

Many points of practice arose in the course of these proceedings, which are detailed in the order of time.

Where four of many actions against the various underwriters on such policies (individually) *had been tried and verdicts passed for the plaintiffs at law*, the Court granted an injunction to restrain them (the plaintiffs at law) from proceeding further, in a case where there was strong suspicion of fraud in the assured, on the money being paid into Court,—on the ground of the answer of one of the defendants not having come in.—p. 168.——But see *Whitmore* v. *Thornton*, *infra*.

The plaintiffs (72 in number) had filed their bill on the 7th *July* 1802, with the object of furnishing a defence to the several actions brought against them, (individually,) on certain policies of insurance,

And the Court of Common Pleas enlarged their rule, which had been obtained for a new trial, until the same time.—p. 169.

The Court will dissolve the injunction, if the amount of the losses claimed, be not paid into Court: and they will not permit money so paid in to be taken out, on the ground of great lapse of time between the filing of the bill and the putting in the answer, unless it clearly appear that the delay was gross and wilful on the part of the defendant, and that he was plainly not disposed to answer at all.—p. 172.

A commission to examine witnesses abroad will be granted, under such circumstances, on the coming in of defendant's answer, although not prayed by the original bill, and the injunction will be in the mean time continued.—pp. 173, 174.——*Note*, The defendant had been very dilatory in putting in a *sufficient* answer.

insurance, underwritten by them in 1798, on voyages to be performed by the ships *Orion* and *Elizabeth*, from the *East Indies* to *Hambro'*, or *North America*;—praying that the defendants might be ordered to produce certain papers and documents, said to be in their possession, and to relate to the subject matter, and to disclose the names of the persons who sailed on board the said ships;—and that an injunction might be issued in the mean time, to restrain the proceedings at law.

The bill charged, that four policies had been effected by defendants, *Chalmers* and *Cowie*, on the *Orion*, and on the *Elizabeth*, upon ship, goods, freight, and money advanced and disbursed;—that the plaintiffs had been called on, on behalf of defendant *White*, for money, as for a partial loss of the said ships and cargoes; and that certain papers had been handed over by *White* to them, to satisfy them, as to such alleged losses; but that many material documents relating to the transaction, which were among the papers in their possession, and which would have served the plaintiffs, as defendants at law, had not been produced;—that the adventure on which the policies had been effected, was not *bonâ fide* on the account of *White*, but was contraband and illegal, being in fact, for the purpose of bringing to *Europe*, *(Holland,)* from *Batavia*, the property of the *Dutch East India* Company, to a very large amount: and that the whole of the insurance was fraudulent, and the pretended loss, a contrivance, for the purpose of charging the plaintiffs with the amount of their subscriptions, as the correspondence and suppressed documents would, if produced, enable

1816.

KENSINGTON and others v. WHITE and others.

enable them to prove; amongst which latter, was a notarial copy of an agreement between *White* and the commissioners of the company at *Amsterdam*, by which *White* had engaged to use his privilege, as a neutral, to effect the illegal object charged;—and that *White*, combining with the other defendants, had declared in the actions at law, averring the interest in himself, *(White,)* (pretending that he was, at that time, a citizen of the United States of *America,)* and that the ships were *American*, and were, in fact, bound on the voyages specified in the policies, with cargoes purchased of the *Batavian Asiatic* Company, on account of himself and other *American* citizens; and that the *Orion*, being driven by stress of weather into the Isle of *France*, was seized, and condemned as prize; and that the *Elizabeth*, on her arrival there, was found to be so much damaged as not to be worth repair, and therefore was abandoned:—whereas the plaintiff charged, —that *White* was not, at the time of effecting the insurance, an *American*, but a *British* subject;—and that the cargoes of the ships, when they sailed from *Batavia*, were the property of the *Dutch East India* Company.

The defendants at first demurred to the bill, as containing in itself several and distinct matters alleged against the defendant, which had no relation to, or dependance on one another; whereby the defendant, if he should be compelled to answer, would be put to great inconvenience in making his defence.

Plumer and *Steele*, in support of the demurrer, admitted

admitted that demurrers for multifariousness were generally applicable to several matters of different natures, charges against different defendants; and that the present ground, as against the same defendant, was novel. But they submitted that it was sufficient, inasmuch as, otherwise, the defendant might be compelled to defend himself in equity against several charges, to some of which he might have a defence, and to others he might not; and an injunction might be obtained, because the defendant might not be able to answer both cases;—and that the present bill was multifarious against *White*, the policies being distinct, and on distinct subjects: as well might a policy and a mortgage be made the ground of the same bill.

Richards and *Cox*, *contra*, contended, that the objects of the bill were compatible; and that in discouraging multifariousness in pleading, the evil of allowing multiplicity of suits, ought not to be overlooked. That the whole was one transaction; and that the other objections were not matter of demurrer.

Demurrer over-ruled.

The actions at law, now sought to be suspended by the injunction, were commenced against each of the underwriters (the plaintiffs) in the Court of Common Pleas, in *June* 1801, *White* being then in *India*. In *Trinity* Term 1802, four of the causes were set down for trial, after a delay of twelve months; when the plaintiffs, (the defendants at law) finding it was intended to try them, and fearing that

1816.

KENSINGTON and others v. WHITE and others.

that they had not sufficient evidence of the defence of fraud, on which they relied, filed the present bill: but the defendants' attorney having delayed compliance with an order of this Court, to appear for the defendants, until it was too late for the plaintiffs to move for an injunction, the causes were tried, and the defendants (plaintiffs at law) obtained verdicts in all: the jury finding that the property was *American*, and not *Dutch*. A great number of the plaintiffs then voluntarily paid into the hands of certain persons, named in an agreement signed by them, the amount of their several subscriptions, in trust, to be applied in satisfaction of whatever judgment should be pronounced by the Court of Common Pleas.

On the 16th *November* following, the plaintiffs obtained an injunction, for want of the defendant *White*'s answer.

On the 22d *November*, *Shepherd*, Serjeant, showing cause against a rule for a new trial at law, which had been granted by the Court of Common Pleas, stated to the Court, the fact of the plaintiffs (in equity) having obtained the injunction, for want of *White*'s answer, since the rule had been granted; which he submitted that they had no right to apply for, under such circumstances, when—

HEATH, *Judge*, suggested that the rule should be enlarged, till the defendant's answer should have come in; which might put an end to the cause.

ALVANLY,

1816.

KENSINGTON and others v. WHITE and others.

ALVANLY, *Chief Justice.* They had a right to get the injunction, and to suspend the effect of the verdict: and we will not give the plaintiff (at law) the fruit of his judgment, till the answer be put in. The object of both parties is clearly this,—the plaintiffs (at law) wish us to give final judgment, so that if the injunction is dissolved, they may take out execution, and prevent the cause from being tried again. But why should we shut the door against future investigation? On the other hand, the defendants desire we should grant a new trial; so that when the injunction shall be dissolved, they may have the benefit of the new evidence?—[*Shepherd* objected that that was what they ought not to be allowed to do, as they should have enjoined the plaintiff before the trial, and not lie by till after the verdict.]—That might be a reason why the Court of Exchequer should not have granted the injunction. And when I sat in a Court of Equity, I considered that a plaintiff, who had waited till a trial was had, was not entitled to the interference of the Court: but as the Court of Exchequer have done so, considering the defendants entitled to it, we must enlarge this rule until the answer is put in. In this case, (which is a suspicious one,) the defendants want to avail themselves of the plaintiffs' own oath; if that should furnish them with no advantage, the plaintiffs will not be prejudiced by it. In the mean time, the defendants shall pay the money recovered against them into Court.

Rule enlarged, till the coming in of the plaintiffs' answer.

On

1816.

KENSINGTON and others v. WHITE and others.

On the 26th *November* (1802), the defendants (in equity) applied to this Court, by motion in the cause, that the injunction might be dissolved; or, that such of the plaintiffs as had not deposited the money claimed on the losses, subject to the deed of trust before adverted to, should now pay that money into Court within fourteen days, to abide the event of the pending actions at law: otherwise, the injunction to be dissolved as to them.

Plumer and *Steele* for the motion.

Richards and *Cox* opposed it.

The Court granted the application; and made an order accordingly, (18th *December*,) in the terms of the motion.

On the 29th *October* 1811, *White*'s answer was filed, which denied the principal charges in the bill; and referred to a schedule for an account of all the papers in his possession, or in that of *Chalmers* and *Cowie*, (the latter of whom, the answer stated to have got the material document in question, but which he, in his answer, denied,) relating to the whole transaction. That answer was excepted to, and all the exceptions allowed. The plaintiffs amended several times; and finally, on the 10th *February* 1812: to which no further answer was for

1806.

KENSINGTON and others v. WHITE and others.

for some time put in. And still this agreement with the *Dutch East India* Company was not forthcoming.

In this stage of the cause, and under these circumstances, the plaintiffs applied, on the 29th *June* 1815, (*White*'s further answer to the amended bill not having yet been filed,) to be allowed to take out of Court the money by them invested in the Three per cents. in trust, in the cause, under the order of the 18th *December* 1802, with the accumulations thereon.

Dauncey and *Winthrop* supported the motion; submitting, on a full statement of all the proceedings, that the plaintiffs ought not to be prejudiced by the defendant's delay in answering; who thus might lock up their money to an indefinite period, if permitted to withhold his answer from time to time.

Martin and *Abercromby*, on the other hand, contended that the object of the application was impracticable. The defendant having obtained a verdict, has been restrained from taking the fruits of it; although he has, by his answer, denied the foundation of the plaintiffs' equity, as he has sworn that the property was his. The Court must be satisfied that the delay is gross and wilful on the defendant's part. Among the present applicants, there may be many who are the assignees, or personal representatives of the original plaintiffs. *White* is not shown to have been the cause of the delay: he is himself in

South

1816.

KENSINGTON and others v. WHITE and others.

South America, whither the commission to take his answer is gone, which was to have been returned by a ship of war. It not being by his neglect, therefore, that the commission has not been executed, he ought not to be deprived of the benefit of the common order which he has obtained, for securing to him the result of his verdicts.

Per Curiam.—The Court will certainly use great caution in parting with money paid in under such circumstances. If, however, they saw clearly that a defendant was decidedly indisposed to answer, they would release the money; but that decided indisposition is not made apparent here. Great allowances are to be made, in consideration of the part of the world to which the commission has gone to be executed, and the other difficulties which must attend its execution and return. The persons to whom it is entrusted, are, probably, but little conversant with such things, and may require to receive instructions in the matter from hence. The Court would probably bear in mind, on any future application for the same purpose, that it was not the first; but at present, we cannot make the order.

Motion refused.

In *September* last, the defendant's further answer came in; and

15th November.

It was now moved, by *Dauncey* and *Winthrop*, pursuant to notice given for this day, (on the 13th,) on an affidavit of one of the solicitors for the plaintiffs, stating

1816.

KENSINGTON and others v. WHITE, and others.

stating the leading facts of the bill; and that the deponent believed that there were persons living at *Amsterdam*, particularly *Sperusz Wiseluis*, and *Daniel Arbman Johanz*, who would be able to give material evidence on the subject of the agreement, (between *White* and the agents of the *Dutch East India* Company, alluded to in the bill,) which would go to prove, that the property in the cargoes of the two ships was really that of the *Dutch East India* Company, and not of defendant *White*; —that without such testimony, the plaintiffs (in equity) could not make out their defence to the said actions;—that the commission was not applied for from any motive of delay;—and that the money sought to be recovered by the defendants, from such of the plaintiffs as continued to resist the claim of loss, and the actions at law, had all been invested in the 3 per cent. consols in trust, to be applied according to the ultimate result of the proceedings.

Martin and *Abercromby* objected to the application for a commission being now made, after a delay of sixteen years. There is nothing on the record to justify the granting a commission; and the plaintiffs have not prayed a commission by their original bill.

THOMSON, *Chief Baron*. I see no reason why the commission should not go, as prayed. The delay alluded to has chiefly arisen from the defendant not having answered as he ought to have done. He

1816.

KENSINGTON and others v. WHITE, and others.

did not put in his answer till nine years after the filing of the bill: and when it came in, it was very insufficient, and hardly any answer at all. The amended bill prayed a commission to examine witnesses residing at *Amsterdam*. Before *White's* answer came in, a trial was had, and a verdict found for the plaintiffs at law, which, it is stated, was owing to their having proceeded without the testimony of the witnesses sought to be examined.—It is most likely, that if the plaintiffs had obtained a commission at that time, they would not have been able to get it executed, as *Holland* was then, and until lately, under hostile dominion. There is nothing, therefore, as it seems to me, to preclude the granting the commission prayed, which may be proceeded in in the ordinary way.

GRAHAM, *Baron*. The novelty of this application, is answered, by adverting to the particular situation of the parties to this suit at different periods. And in all cases of this description, the Court must be guided by the circumstances brought before them.

WOOD, *Baron*, concurred.

RICHARDS, *Baron*, of the same opinion.—The right of a plaintiff in equity, ought not to be affected by any delay on the part of the defendant. Here, the defendant has not in fact put in any answer till *September* last; for that is the only answer on which the plaintiffs could have proceeded. The injunction

1816.

KENSINGTON and others v. WHITE and others.

injunction ought to have been applied for before, and then it would properly have staid the proceedings at law before the trial.

Motion granted.

The injunction to be continued, till the return of the commission, and publication passed.

1816

Tuesday, 19th November

Sir WATKIN LEWES *v.* MORGAN and others.

The Court will not direct the Deputy Remembrancer to proceed to make a general report, until the previous orders for separate reports are regularly disposed of, although he have before him a full state of facts.

DAUNCEY moved, that, notwithstanding the order of the 20th *June* 1801, for making a separate report in this cause, and subsequent orders with respect thereto, and the order of the 11th *July* 1810, for a further separate report, the Deputy Remembrancer of this Court may be directed to proceed, without delay, to make his general report, pursuant to the decree pronounced on the hearing of this cause, dated 2d *July* 1796, he having now before him a full state of facts.

The Court refused to make the order, holding that they could not direct a general report to be made, until the separate report had been regularly disposed of in the usual course.

1816.

Tuesday, 19th November.

BIRDWOOD, Assignee of HART, *v.* STEPHEN HART and MORRIS HART.

If a copy of *supbœna ad resp.* be left with a servant of defendant's brother (who was also his partner and a co-defendant in the suit), at whose house such servant acknowledged that he resided at, will be good service, although the party be out of the kingdom at the time.

[*6th November.*]

THE defendant, *Morris Hart*, had been taken on an attachment for a contempt, in not appearing to a *subpœna* taken out against the defendants, on an affidavit of service, "by delivering a copy thereof "to *Ann Cox*, a servant of the above-named de- "fendant *Stephen Hart*, at his dwelling house, "where the said *Morris Hart* also resided."

Spankie obtained a rule to show cause why the attachment should not be set aside, with costs, on an affidavit of *Morris Hart*, that he had quitted *England*, before the issuing of the writ of *subpœna*, on a voyage to *Holland*, and did not return till the 6th *September*,—that he had not received the copy till his return,—and that, at the time of the service, he was actually at *Helvoetsluys* on said voyage.

And a rule (for setting aside an attachment) obtained on a representation that the party was abroad at the time of service, will be discharged, on such cause shown, with costs.

[*19th Novemb.*]

Dauncey now showed cause, by an affidavit, that *Stephen* had been personally served with a copy of the *subpœna*,—that *Ann Cox*, *Stephen*'s servant, had acknowledged that *Morris* resided at his (*Stephen*'s) house, but was then out of town;—that a copy was then given to her, which she promised to give to him when he returned. He stated, also, that the defendants were brothers and partners in trade—that they lived together, but were each occasionally absent on the joint business of both.

In

In Lady *Carrington* v. *Cantillon (a)*, service of *subpœna* on one partner, was held good service on his partner then in *France*. It is acknowledged, that he resided at *Stephen*'s house, and that he received the process on the 6th *September*, when he might have appeared. The *subpœna* issued on 28th *June*, and the attachment issued on the 31st of *October*.

Spankie, in support of the rule. It does not appear that defendants were partners. *Ann Cox* was not a servant of the party himself, nor does it sufficiently appear that *Morris resided* at *Stephen*'s house. *Morris* being out of the kingdom at the time, could not be brought into contempt by such a service of process.

Per Curiam. This is the case of service of process, by leaving it with a servant, at the house which was the general place of abode of the party when in *England*, who occasionally goes abroad on business, and was out of the kingdom at that time.—Such a service of *subpœna* is good*, and an attachment may be well founded on it.

Rule discharged, with Costs.

(a) Bunb. 107.

* The officer certified that the service was regular.

1816.

Tuesday, 19th November.

The King v. Abbott.

2 8 18 616

[8th November.] G. having a *fee simple* in lands, mortgages for *a term* of 1000 years; he has no longer any *estate* or interest in the lands higher than an equity of redemption only.

[19th Novemb.] And if, on his becoming bankrupt, his assignees take [19th November] upon themselves to sell the whole property absolutely as the estate of the bankrupt, such a sale is not within the exemption of the 19th *Geo.* III. ch. 56, sec. 15, and is therefore liable to the auction duty.

GASELEE obtained a rule to show cause, why the verdict which had been taken for the Crown, on this *scire facias*, for duties on an auction bond, should not be set aside, and entered for the defendant. The cause was not tried, but the following statement of facts was agreed on by the counsel on both sides, which the Lord Chief Baron reported as having been proved:

"That Mr. *John Abbott*, the defendant, is a licenced auctioneer, and executed the bond in the pleadings in this cause mentioned. That, on 1st *August* 1813, the defendant gave the annexed notice * and catalogue to the proper officer of Excise, of an auction sale, to be held by him at *West Cowes*, in the Isle of *Wight*, on the 4th

* "*West Cowes, Isle of Wight.*—To be sold by auction, by Messrs. *Briggs* and *Abbott*, by order of the assignees of *John Geley*, at the *Vine* inn, *West Cowes*, on *Wednesday*, 4th *August* 1813, at two o'clock in the afternoon, a freehold close of meadow land, with a labourer's cottage thereon erected, situate near *West Cowes* aforesaid, containing about four acres, late in the occupation of *John Geley*."

Quere—If the assignees had previously redeemed the estate.

Nor will the Court, on such a sale, deduct the proportional part of the duty payable on the value of the equity of redemption, for they consider the entire duty to be payable by the auctioneer on the whole, at the conclusion of the sale; and if the interests are blended so indiscriminately by the assignees, whose duty it is to keep them apart, the Court will not relieve them.

August

1816.

The KING v. ABBOTT.

August 1813.—That the sale took place on the day mentioned in such notice, when the property in the pleadings mentioned, was sold at auction by the defendant, to the highest bidder, for the sum of 800 *l.*—That on the 21st *September* 1813, the defendant accounted for this sale in *London*, with the proper officer of Excise, by delivering the annexed printed copy of the particulars of sale, and writing thereon, "sold for 800 *l.*"—That the defendant, at the same time, made before the proper officer the usual affidavit.—That such particulars, so delivered by the defendant, were, at the time of such delivery, endorsed * by the certificate of the assignees, hereinafter mentioned, appearing thereon.—That the auction duty on such sale was, on the 4th *November* 1814, demanded of the defendant by the Commissioners of Excise, under the following circumstances:—That the property in the pleadings mentioned, and sold by the defendant at auction, were purchased by *John Gely*, on 10th *October* 1799, and were, by indentures of lease and release, conveyed to the use of *Thomas Sewell*, his executors, administrators and assigns, for the life of the said *John Gely*, in trust; nevertheless, for the said *John Gely* and his assigns, for the term of his life,

* Endorsement:—"We humbly certify, the land, as specified in this particular, was the property of Mr. *John Geley* at the time of issuing out a commission of bankrupt against him, and was sold for the benefit of his creditors.—As witness our hands this 4th day of *August* 1813.

"Witness, *F. Worsley.*" "*Wm. Spickernell*, "*Ben. Mew*, } Assignees.

1816.

The KING v. ABBOTT.

and, to prevent dower, with remainder to the use of the said *John Gely*, his heirs and assigns, for ever.—That by an indenture, dated the 4th day of *April* 1810, the same premises were demised, by the said *John Gely* and *Thomas Sewell*, to *Thomas Godsell*, his executors, administrators and assigns, for a term of 1000 years, to secure 400 *l.* and interest, with a proviso and covenant for redemption, on payment of such 400 *l.* and interest, on the 4th day of *October* 1810.—That on 4th *April* 1811, by a further indenture, the same premises were charged by the said *John Gely* with a further sum of 130 *l.* and interest, to the said *Thomas Godsell*, of which indenture the said *John Gely*, for himself, his heirs, executors and administrators, did covenant and agree with the said *Thomas Godsell*, his executors, administrators and assigns, that the said indenture of demise, by way of mortgage, and the said premises, and also the title deeds, evidences, writings and muniments of title of and concerning the same, should from thenceforth stand, remain, continue and be charged and chargeable with and be a security for the payment of the further sum of 130 *l.* with interest; and that neither the said *John Gely* or his heirs, or any other person or persons then claiming, or therefore to claim, from, by, or under him or his heirs, or any other person or persons whomsoever, should or might have or claim, or be entitled to have or claim any right, title or interest, in law or equity, of, in, or to the same premises, or any part or parcel thereof, or to the said title deeds, evidences, writings, and muniments of title, or any of them, until such sum of 130 *l.*

1816.

The KING v. ABBOTT.

130 *l.* with interest, and also the said sum of 400 *l.* with interest, should also be fully paid and satisfied to the said *Thomas Godsell*.—That on the 18th *April* 1812, a commission of bankrupt was issued against the said *John Gely*, under which he was duly declared a bankrupt; and that *Benjamin Mew* and *William Spickernell* were chosen and appointed assignees of his estate and effects.—That, on the 2d *June* 1812, an assignment was made by the Commissioners to such assignees, under the said bankruptcy, of the estate, right, and interest of the bankrupt in the said premises, and of other his estates and effects, subject to such mortgage or mortgages, and other charges and incumbrances, as the same were legally charged with and liable to.—That the bankrupt continued in possession until the time of the bankruptcy, and that the premises were put up to sale, and sold by order of the assignees.—That, on 31st *December* 1813, after the sale before mentioned, the said premises were conveyed to the purchaser in consideration of 800 *l.* of which 602 *l.* 12 *s.* were paid to the said *Thomas Godsell*, for principal and interest due to him upon his aforesaid mortgages, upon which he assigned the aforesaid term of 1000 years to the purchaser; and *Thomas Sewell*, the trustee of *John Gely*, conveyed his right and interest in the premises to the purchaser, and 197 *l.* 8 *s.*, the residue of the sum of 800 *l.*, was paid to Messrs. *Mew & Spickernell*, the assignees of the bankrupt, and they, in consideration thereof, conveyed also their right and interest to the purchaser.—That the defendant having refused payment of duty upon this auction, contending

1816.

The KING v. ABBOTT.

contending that, under the circumstances, no duty was payable, the *scire facias*, mentioned in the pleadings in this cause, was issued against the defendant.

The *Solicitor General*, *Dauncey*, *Clarke*, and *Walton*, now showed cause.—They stated the main question to be, Whether, under the circumstances of this case, the subject matter of the sale by auction, to recover the duty on which this proceeding was founded, was liable, as having been so sold, to the duty imposed on sales by auction, by the 19 *Geo.* III. ch. 56?

By the 43 *Geo.* III. ch. 69, shed. A. (Excise Consolidation Act) a duty of 6*d.* in the pound is imposed on "any sale at auction of any interest, "in possession or reversion, in any freehold, cus- "tomary, copyhold, or leasehold lands, tenements "or hereditaments, &c. &c." But then the 15 sect. (19 *Geo.* III.) provides, and enacts, that "nothing "in this, or in the said recited act contained, shall "extend, or be construed to extend, to charge with "the said rate or duty, any estate, goods or chat- "tels sold at auction, under the authority of any "sheriff or under-sheriff, for the benefit of creditors, "in execution of any judgment had or obtained, "*or any estate or effects of bankrupts, sold by* "*order of the assignee or assignees under any* "*commission of bankruptcy.*" Unless, therefore, the subject matter of the present sale can be brought within this provision, it is, as the Crown contends, clearly liable to the auction duty.

The

1816.

The KING v. ABBOTT.

The argument then will be reduced to the single question, Whether that which has been so sold by the defendant, was, or was not, at the time of commission issuing, the estate of the bankrupt?

On that point there is to be found a very high authority, in a decision at *nisi prius*, which bears strongly on this question, and is itself decisive of the point. That is the case of *Coare* v. *Creed (a)*. The action was *assumpsit* for money had and received, and was brought against the defendant, an auctioneer, to recover a deposit, made by a purchaser, on the sale of an estate. One *Palin* had mortgaged the estate to the plaintiff, and having subsequently become bankrupt, it was put up to be sold. By an order made by the Lord Chancellor, it is decreed, that "all the estates of a bankrupt in "mortgage, shall be sold before the commissioners." The sale in question had been made before the commissioners acting under the commission against *Palin*, by the defendant as auctioneer; and the sum of 65*l*., for which the action was brought, had been paid as a deposit.—The defendant paid into Court 45*l*. 10*s*. and claimed a right to deduct the remainder for the auction duty, and one guinea for his trouble. The plaintiff relied on the 15 sec. of the 19 *Geo.* III, and contended that the sale being of a bankrupt's effects, was not liable to the duty. The defendant pleaded that, as auctioneer, he was bound to pay over the duty to the collector; and insisted, that the sale, being on the part of the mortgagee, was

(*b*) 2 Espinasse, 699.

not

1816.

The KING v. ABBOTT.

not the estate of the bankrupt, and therefore liable to the auction duty which he had so paid. Lord *Kenyon* was of opinion, that the estate was liable to the auction duty, and directed the jury to find a verdict for the defendant, which they did. That case establishes that the sale of an estate, mortgaged by a bankrupt, is not a sale of the *bonâ fide* property of the bankrupt, and, consequently, not of such property as this statute meant to protect from the duty, that is, property out of the sale of which creditors, under an execution or a commission, would be entitled to be paid a dividend—such alone was the property intended to be relieved from the duty. That intention is further supported by the 15th section, which, for the better preventing frauds, enacts (after a similar enactment respecting estates, goods, &c. sold under an execution) "that every "auctioneer who shall be employed by the assignees "under any commission of bankruptcy, to sell the "effects of any bankrupt, shall likewise specify and "enumerate in the catalogue, to be by him deliver-"ed, the particular goods and effects then to be "sold, and the assignees, or the assignee, if only "one under such commission, shall subscribe and "sign such catalogue, and certify, at the foot "thereof, that all and every the estates, goods, "chattels, and effects, in such catalogue respectively "specified and enumerated, *were really and truly* "*the property of the said bankrupt at the time of* "*suing forth the said commission.*" It concludes by imposing a penalty of 50 *l.* on every offence of permitting to be inserted in such catalogue any other estate, goods, &c. than should be really and truly

truly the property of the debtor or bankrupt. Every where the statute contemplates property only as is really and truly the property of the bankrupt.

In this case, the equity of redemption was the only property which the bankrupt had in the subject of sale, or could himself sell; but the whole has been sold, and the mortgagee has been satisfied; and shall he not pay the auction duty on a sale by which he is benefited? The sale of the whole has most probably been more advantageous in increasing the purchase money, than it would have been to have sold either the equity of redemption, or the mortgage term alone; and if so, neither party should hesitate to pay the duty on the mode of sale which has benefited both.

Nor does it affect this case, that the nature of the bankrupt's interest may be greater or higher than that of the mortgagee; and whether it be real property, or a chattel in one or the other, is a consideration out of the present question, which leads merely to an inquiry, not of the quality, but of the quantity of the bankrupt's interest.

Now the bankrupt and the incumbrancer have distinct and separate estates in the property: both are the subject of sale, and each might have been sold independently of the other, and for the benefit of either alone. There could be no doubt, if the mortgagee had sold his term by auction, that that sale would have been liable, as much as the adjoining land of a third person would have been, if it had,

1816.

The KING v. ABBOTT.

had, for the accommodation of this lot, and for advancing the sale of it, been put up and sold with it. The mortgagee is not to be protected, then, under colour of a sale of the property of the bankrupt mortgagor; for if that could be done, it would be an effectual means of evading the auction duty whenever there were parties to collude, which might be whenever there were parties in the situation of these. In this instance, too, the actual interest of the bankrupt was a mere trifle, compared with that of the mortgagor; and yet, because so slender an interest happens to be sold at the same time, it is contended, that the greater and more valuable subject matter of the sale is to be exonerated from the duty.

Had the assignees paid off the mortgage-money, then a question might have arisen; at present, they have undertaken to sell the whole: the whole was not the property of the bankrupt at the time of issuing the commission, and therefore not within the exemption; consequently, the auctioneer is liable for the whole amount of the duty on the sale.

Gaselee and *Pollock, F.* for the defendant, admitted that if the law was against them, the certificate of the assignees would be nugatory; but contended, that the *estate* which had been sold was literally the undoubted *estate of the bankrupt*, at the time of issuing the commission and the sale. He had the fee—the freehold—the paramount estate in the property: it was entirely his in equity, while the mortgagee had nothing more than a minor interest in

1816.

The KING v. ABBOTT.

in it, subservient to that of the bankrupt; of which interest the estate of the mortgagor might at any time be discharged and exonerated, by the payment of the principal and interest due on the mortgage, and that without requiring the assent or concurrence of the mortgagee.

Then it was *sold by order of the bankrupt's assignees*, as the property of the bankrupt, without any consentaneous concurrence on the part of the mortgagee, who could not in any manner interfere effectually to prevent the sale, and who would be compellable, on tender of what would be due to him at the expiration of six months after notice, to join in executing an assurance to a purchaser; and six months would have elapsed by the time this sale could have been completed. His assent was not necessary to perfect the sale, nor could his dissent have obstructed it. The property was still the bankrupt's, although the mortgagee had an interest in it, and a lien on it. There is a strong case on that point in *Atkyns, (Eliz.* and *Mary Casborne* v. *Scarfe* and *Inglis) (a)*, the substance of which is this:—The father of the plaintiffs, devised to *Anne* his daughter, the plaintiffs' eldest sister, all his estate, freehold and copyhold, in fee, charged with 200*l.* a-piece to the plaintiffs. *Anne*, after her father's death, possessed the several estates, and afterwards intermarried with the defendant *Inglis*; but before her marriage, she mortgaged part

(a) 1 Atkyns, 603.

of

1816.

The KING v. ABBOTT.

of the freehold to the defendant *Scarfe* for 900*l*. She died soon after her marriage, leaving a son, who died without issue. The question was, Whether the defendant *Inglis* was entitled to be tenant by the curtesy to the estate comprized in the mortgage? The Master of the Rolls held, that he was not entitled to be the tenant by the curtesy, of that part of the premises comprised in the mortgage: but the Chancellor was totally of a different opinion; and, on giving his judgment, said, "It is certain "the mortgagee is not barely a trustee to the mort- "gagor; but to some purposes, *videlicet*, with regard "to the inheritance, he certainly is, till a fore- "closure." In this case the mortgagee must also be considered as merely a trustee of the inheritance for the mortgagor, whose property, till foreclosure, the freehold certainly is. His Lordship, proceeding in his judgment on that case, gives, as one reason of his decision, that an equity of redemption has always been considered *as an estate in the land*, for it may be devised, &c.; and adds, "the per- "son, therefore, entitled to the equity of redemp- "tion is considered as *the owner of the land*, and a "mortgage in fee is considered as personal assets:" and therefore he reversed the decree of the Master of the Rolls, as to that part of it which held the defendant not to be tenant by the curtesy.

Nor is it ever for the benefit of the mortgagee that the mortgaged estate is sold: he must be paid his full principal and interest, if the estate shall produce it, and that free of all sort of deduction—expenses of sale—of collecting mesne profits—of repairs, and all incidental

incidental charges. He can acquire no advantage by the sale; on the contrary, he might be a loser. This sale was involuntary on his part, and he might have been totally ignorant of it. Then, on what pretence can he be called on to pay the duty? It is true, he consents to receive his principal and interest due on the mortgage after the estate has been sold, and about a month before the time when he might have been compelled to take it; but such an act is no proof of his assent to, still less of his moving the sale: nor does that conduce to his benefit; for he gains nothing by receiving his money sooner than he might have been obliged, by adopting the proper course, to accept it.

The doctrine said to be held by Lord *Kenyon*, in the case of *Coare* v. *Creed*, would totally do away the object of the statute, the spirit, if not the letter of which would be contravened by such a construction; for in many instances the duty would fall ultimately on the creditors, for whose benefit the exemption was intended to operate. Suppose this estate had sold for considerably less than the mortgage-money due at the time of issuing the commission, the mortgagee would in that case be entitled to prove under the commission for the amount of the deficiency, which would be so much the greater as the produce of the sale of the estate would have been less, by reason of the deduction of the auction duty; for the net produce of the sale-money would be all that would be payable to the creditor.

1816.

The KING v. ABBOTT.

In the case of personal property pledged by a bankrupt, for less than its value, to secure money, that undoubtedly would still be the actual property of the bankrupt, notwithstanding the lien of the pawnbroker; and if sold by order of the assignees, would be sold as the property of the bankrupt, and not as the property of the pawnbroker. The same might be said of goods warehoused in the *London* Docks, which if sold by assignees of the bankrupt, to whom they had belonged, they would be sold as his goods, and not as those of the company having a lien on them for warehousing. If the assignees are liable to the auction duty on this sale, they would also be liable if it were a case of penalty proceeded for in default of payment; and surely that can hardly be contended.

There is no injury done to the Crown, or loss sustained by the revenue, for the redemption of the mortgage term, before the sale of the estate by the assignees, would have entitled them to sell the whole, free from the duty: and where is the difference, if, for the benefit of a bankrupt's estate, the property is sold, as this has been, without that having been previously done, which would be merely a formality?

It was then pressed, that if the Court should be ultimately of opinion that this sale was chargeable with the auction duty, still there will be the value of the equity of redemption to be deducted; for that, undoubtedly, was the property of the bankrupt, and clearly within the exception of the statute.

The

1816.

The KING v. ABBOTT.

The *Solicitor General*, in reply, submitted, that the word 'estate,' in the statute, did not mean the ownership of the land, but the beneficial interest of the bankrupt, and that, in truth, was all which they could sell; and in this case, he had merely the equity of redemption. If the bankrupt had been entitled to an undivided moiety, that would not have sold so advantageously as the whole; but should the whole be sold, the whole must pay the duty, because it was not the property of the bankrupt, nor could it have been so certified; and the auctioneer (for the onus of payment falls on him *) must have paid the duty on the whole. It would be the fault of the assignees so to blend the interest of the bankrupt with that of other persons, as to furnish opportunity for the committing of fraud on the revenue, which would be often the consequence of such confusion; when the proper and clear course would have been to sell what the bankrupt had, and no more; thereby obviating all difficulty and danger, as well on the part of the bankrupt's creditors, as of the Crown †. If those who have the care of the bankrupt's interests, do not take due

* 19 *Geo.* III. c. 56, s. 7.

† By Sect. 16, it is enacted, That "every auctioneer who shall sell at auction any estates, goods or chattels that have been seized by any sheriff or under-sheriff, or by their authority, and by them or either of them taken for the benefit of creditors, in execution of any judgment had and obtained, shall specify and enumerate in the catalogue by him to be delivered under the directions of this act, as well the particular estates and effects to be sold, and also the exact sum to be levied under such execution; and the sheriff or under-sheriff respectively shall, and they are hereby required to subscribe and sign every such catalogue, and to

1816.

The KING v. ABBOTT.

due means to protect them, by ascertaining and describing what it is that he is actually entitled to sell, it is not for the Crown to do it. Legal and equitable interests are perfectly distinct. Here, the bankrupt had merely an equitable, and not a legal, interest in the estate sold.

certify at the foot thereof, that all and every the estates, goods and effects in such catalogue respectively specified and enumerated, were really and truly the property of the person against whom such judgment was had and obtained, and that the same and every part thereof were actually seized in execution of the same judgment; and every auctioneer who shall be employed by the assignees under any commission of bankruptcy, to sell the effects of any bankrupt, shall likewise specify and enumerate in the catalogue to be by him delivered as aforesaid, the particular goods and effects then to be sold; and the assignees or assignee, if only one under such commission, shall, and he and they is and are hereby required to subscribe and sign such catalogue, and to certify at the foot thereof, that all and every the estates, goods, chattels and effects in such catalogue respectively specified and enumerated, were really and truly the property of the said bankrupt at the time of suing forth the said commission; which respective catalogue so signed and certified as aforesaid, shall be produced by every such auctioneer to the person to whom such auctioneer is by this act directed to deliver his account, before such auctioneer shall be permitted to pass his account, or to have the same allowed; and if such sheriff, undersheriff, assignee or assignees respectively shall insert, or suffer or permit to be inserted in any such catalogue so to be subscribed, signed and certified as aforesaid, any estate, goods, chattels or effects whatsoever, other than such as were really and truly the property of the debtor or debtors, bankrupt or bankrupts as aforesaid respectively; or if any sheriff or undersheriff shall omit or neglect to certify on such catalogue the true sum to be levied, or shall certify thereon any false sum to be levied, then and in every such case the party offending shall, for every such offence respectively, forfeit and lose the sum of twenty pounds."

In

In the case of sale of personal property pledged, also, the assignees could only sell the bankrupt's qualified interest in it, and subject to the lien.

As to the distinction taken between the actual estate of the bankrupt sold (the equity of redemption) and the claim of deduction made on the amount of that interest, that is not a question for the Court on this motion; but must be the subject of consideration on an application for the allowance of such a claim, to be made elsewhere.

He abstained from the discussion of the case put, of the estate having been previously redeemed.

THOMSON, *Chief Baron.* Unquestionably, the auctioneer is liable to the payment of the duty charged on this sale by auction, unless he can show the estate to be within the exception of the act. Now he has, in point of fact, sold the *whole*, without any distinction of the interest of the bankrupt, or of the mortgagee. It was sold by order of the assignees, certainly; but all that they had a right to sell was the equity of redemption merely. They had undoubtedly a right to redeem the mortgage, and thus, make the estate their own; and had they done so, it would have been a very different question, although the statute enacts that the assignees shall certify, that all and every the estates, goods, &c. specified in the catalogue, were really and truly the property of the bankrupt at the time of suing forth the commission. It is not necessary, however, at present, to consider that question. They might also have ordered

1816.

The KING v. ABBOTT.

the equity of redemption only to have been put up, and that would certainly have brought it within the excepted cases. The meaning of the exception is, that the produce of that property which would go, when sold, to the satisfaction of creditors, should not be liable to the duty, as matter of commiseration; and in this case that was merely the produce of the sale of the equity of redemption. If the assignees could have ordered an absolute sale of the whole estate in this way, they might have done the same thing if the bankrupt had been entitled to an undivided share, however small, in the same estate, in common with other persons; and in that case, can there be any doubt that the produce of the sale would have been liable to duty? I think not.

As to the hardship of the case, all that might have been avoided (as has been suggested by the Attorney General) by pursuing the clear course pointed out by the act, for the express purpose of preventing confusion and fraud.

The defendant has, therefore, not brought himself within the exception provided by the act, and he is therefore liable to the whole duty chargeable on the amount of the produce of this sale. Whether any favour may be shown as to allowing a deduction to be made of any part of that duty, in consideration of the equity of redemption, that is not for us to say.

GRAHAM, *Baron.* The general policy of the act is quite clear, and this clause is only applicable

to

1816.

The KING v. ABBOTT.

to the exemption of the convertible estate and effects of a bankrupt so sold, and to these alone; and it is incumbent on the assignees to ascertain of what they consist. Nothing is plainer than the common distinction in equity between the interests of a mortgagor and of a mortgagee,—between the legal and equitable estate. It is a frequent practice to direct a sale of an equity of redemption alone, and that is what the assignees should have done here. It is not important whether the mortgagee's assent was expressed or implied. The assignees chose to sell the whole, and may have pledged themselves to make a title to the purchaser; and if, in doing so, they take upon themselves to sell the property unincumbered, for their greater advantage, they must do it with all its consequences.

In the case of pledges of personal goods, the property is substantially in those who have the rightful possession. In this instance, I am clearly of opinion, that the assignees have made themselves liable to pay the duty.

WOOD, *Baron*, absent.

RICHARDS, *Baron*, of the same opinion. The bankrupt was, at the date of the commission, seised in fee of the estate in question, subject to the mortgage; the mortgagee having the legal estate, and the bankrupt, only the equity of redemption: and while the mortgagee has a term of 1000 years as a security, I cannot understand that he had not the property; and if he had, the mortgagor had not.

1816.

The KING v. ABBOTT.

Their interests are perfectly distinct, and that distinction is very familiar to Courts of equity. The mortgagee is not, in any respect, under the control of the mortgagor; nor could he be compelled to receive his money, even at the expiration of six months notice; for then he might have driven the mortgagor into equity to redeem the estate. It is frequently of great advantage to both mortgagor and mortgagee, that the estate should be sold free of the incumbrance; the former, if he wants his money, gets it sooner, and the latter sells his estate better: then, why should they have the benefit of the exemption? The case which was put of a sale by a tenant in common, is strongly in point. Another case is that of a bankrupt having a reversionary interest, and his assignees should sell the whole: it would be no ground of exemption, under this statute, that the tenant for life should concur with him to make a title presently to the whole estate: could it be said that the assignees, in that case, were selling the property of the bankrupt? And where is the difference between such a case and the present?

I am clearly of opinion, therefore, that the auctioneer has become liable to the duty charged on sales of estates by auction, and that the present case is not within the exception.

As to the hardship,—that must always give way to the circumstances of the particular case: that is a subject matter for arrangement among the parties themselves. The disposal of property is often subjected to various unforeseen inconveniences, which cannot

1816.

THE KING v. ABBOTT.

cannot be remedied. If the mortgagee had sold his mortgage by auction, he would have become liable to pay the duty, although the sale had not proved sufficiently productive to satisfy his debt. If we should decide that this sale was not liable to the duty, we should hold out an encouragement to collusion between bankrupts and mortgagees, by which the revenue might be enormously defrauded. According to my construction of this statute, I think we ought to discharge the rule.

Rule discharged.

1816.

Wednesday, 20th November.

RICHARDS, Gent. one, &c. and another *v.* SETREE.

DAUNCEY and *Jones, D. F.* now showed cause against a rule which had been obtained by *Owen*, the 16th instant, for setting aside the interlocutory judgment, (which had been signed in this cause in default of plea,) for irregularity, with costs.

If a plea in abatement be not supported by a proper affidavit, the plaintiff may sign judgment immediately.

A mistake in the parties of the suit, in the title to such an affidavit, renders it insufficient to support the plea, although it refer expressly to the annexed plea, in which the title of the cause is right.

Quere,—Whether an attorney of another Court is entitled to plead his privilege in abatement, against the privilege of the officers of this Court.

The Court will not permit cause to be shown, before the day for which the rule is drawn up, for the sake of enabling the party to save the Term.—*Sed quere*, if that be suggested at the time of the application.

Nor will they impose terms with a view to expedite the execution of a writ of inquiry.

The

1816.

RICHARDS, &c. v. SETREE.

[The rule having been drawn up for the 19th, the plaintiffs' Counsel claimed a right to show cause against the rule, on the day following that on which it was obtained, to save the term; which was opposed, and the Court said, that till the day after it could not be moved to make the rule absolute; nor could they decide to-day *ex parte*, and to-morrow hear the other side. It is contrary to practice to allow cause to be shown till the day after that for which the rule is drawn up.

Jones then applied, that conditions might be imposed, to afford the plaintiff the advantage he would have had of executing his writ of inquiry if the rule had not been obtained, and to obviate the consequences of the intermediate delay; but the Court refused the application.]

The defendant, who was an attorney of the Court of King's Bench, was sued as the acceptor of a bill of exchange by the plaintiffs, who were indorsees. The process, which was a *venire facias ad respondendum*, described the plaintiffs as *Stephen Richards*, gent. one of the six clerks of *Benjamin Price*, gent. one of the sworn clerks in the Office of Pleas in our said Exchequer, and *Charles Clarke*:—and was returnable the 6th *November*. On the 7th *November*, notice of declaration *de bene esse* (to plead in eight days) was regularly served, judgment was signed on the 11th, and notice of inquiry served on the 12th.

The defendant's affidavit, on which the rule was granted, stated that he was served with notice of declaration

declaration on the 7th *November*,—that on the 9th he filed a plea of privilege, as an attorney of the Court of King's Bench, and an affidavit of verification.

1816.

RICHARDS, &c. v. SETREE.

On showing cause, it was submitted, that, notwithstanding the defendant had originally till the 15th to plead, yet, by having put in a bad plea, he had waived his time, and the plaintiff became entitled to sign judgment *instanter*, *Brandon* v. *Payne (a)*.

As to the validity of the plea, the plaintiffs' Counsel urged, first, that the affidavit of verification was a nullity, because it was entitled in a cause of *Stephen Richards*, gent. one of the six clerks of *B. Price*, gent. one of the sworn clerks in the office of Pleas, in the Court of Exchequer at *Westminster*, plaintiffs, and *Henry Setree* defendant: whereas, the true title of the cause was, as given in the affidavit, with —"and *Charles Clarke* plaintiff." All affidavits should be entitled, and as of their proper cause *(b)*. Secondly, that the plea of privilege, which, as a dilatory plea, was to be received with strictness. *Robinson* v. *Moon (c)*, was superseded by the plaintiff's privilege in this Court, as there could be no privilege pleaded against privilege, *Lander* v. *Cokayn (d)*; and whenever a plea may be treated

(a) 1 T. R. 689.
(b) Tidd's Practice, p. 496. (5th ed.)
(c) 5 T. R. 488.
(d) Barnes, 44.

as

1816.

RICHARDS, &c. v. SETREE.

as a nullity, the plaintiff may sign judgment, *Gray* v. *Sydneff (e)*, *Lockhart* v. *Mackreth (f)*.

Owen, in support of the rule, submitted that the objection taken to the title of the affidavit, being a mere clerical error, was not a fatal defect, particularly as the affidavit itself, which is attached to the plea, removes any apparent uncertainty, by its express reference to the plea and the cause.—The language of it is, that "*Henry Setree*, one "of the attornies of our Lord the King, before the "King himself, the defendant in this cause, maketh "oath and saith, that the plea, hereunto annexed, "is true in substance and in fact;" so that there could be no doubt about the identity of the cause in which the affidavit is made. It has been recently established, that where the cause, relating to which an affidavit have been filed, can be sufficiently ascertained, by reference to it in the body of the affidavit, so as to admit of an indictment for perjury, it will be enough.—*Prince* v. *Nicholson (g)*. In that case, which was in the Common Pleas, the affidavit was not entitled at all, but as it referred to the *annexed plea*;—that reference was held to supply the defect of title,—and so, here, the same reference may cure the same defect, on the same principle of *verba relata videntur inesse*.

[GRAHAM, *Baron*, expressed some doubt of the point, as ruled in that case.

(e) 3 Bos. & Pul. 395. (f) 5 T. R. 661.
(g) 5 Taunt. 333.

THOMSON,

1816.

RICHARDS, &c. v. SETHER.

THOMSON, *Chief Baron.* Every affidavit made in the course of a cause, after its actual commencement, should be entitled as in that cause, and should be correctly entitled.]

The affidavit is incorporated in the plea, and forms a part of it, and therefore the title might be rejected altogether as surplusage.

[The question of privilege was much discussed, but the Court gave no opinion on it.]

THOMSON, *Chief Baron.* This is a question as to the validity of the plea of privilege, which has been pleaded in abatement. There is no objection made to the form; but it is said that it has not been properly supported, by the affidavit of the truth of it, which is required in all pleas of abatement. The body of the affidavit, too, is admitted to be right in itself, but an objection is made to the title of it, which is, that it purports to have been made in another cause than that now before the Court. —[*His Lordship stated the title of the affidavit, and of this cause.*]—Certainly, wherever an affidavit is made in a suit that has been commenced, it ought to be entitled, and as of the precise cause in which it is to be used.

A case has been cited, where, it is said, the Court of Common Pleas received an affidavit without title, because the Court thought, that by reference from the body of it, the title of the cause might be supplied

1816.

RICHARDS, &c. v. SETREE.

plied by the one prefixed to the annexed plea: but even supposing that to have been rightly decided, it does not apply to the present case; for here, a specific title is given to this affidavit, and that turns out to be not the title of this cause. In assigning perjury, it must be shown that there was such a cause pending as that from which the affidavit takes title.

The plea, therefore, was insufficient, for want of a proper affidavit in support of it. So that, independent of the other question on the validity of a plea of privilege, which, under the circumstances of this case, it has become unnecessary to discuss, the plea was, on that ground, a nullity, and the plaintiff was entitled to sign his judgment at the expiration of the four days.

GRAHAM, *Baron*, of the same opinion. It is necessary that every affidavit should carry intrinsic evidence of the cause in which it is used; but the title to this affidavit, on the contrary, shows that it was not made in this cause; and one made in any other, might as well be offered as this. I also cannot think that the case cited from the Common Pleas, is right, on the point which it goes to establish, that the defect of title to an affidavit may be supplied by reference.

WOOD, *Baron*, absent.

RICHARDS, *Baron*. The objection, that the plea was not supported by the proper affidavit, is quite

quite sufficient to entitle the plaintiff to sign judgment. Had it been necessary to go into the other point, I should wish to see the record.

1816.
RICHARDS, &c. v. SETREE.

Per Curiam,

Rule discharged, with Costs.

1816.
Wednesday, 20th November

The KING *v.* M'LEOD.

The bonds given by masters of vessels, under 26 *Geo.* III. ch. 40, are continuing bonds, and remain in force as long as the same person is master of the same ship; but not when he becomes master of anyother vessel.

THIS was a proceeding by *scire facias* against the defendant, as master of the ship *Ann*, on the usual bond given by persons in that character, under the 26th *Geo.* III. ch. 40, sec. 15, for breach of the condition*.—Plea, performance.

It is not necessary, therefore, that a fresh bond should be given on every voyage made by the vessel while in his charge, for the same bond covers all voyages made in her by him, and may be sued on for a breach of the conditions during any one or more of them.

* The argument turns entirely on the words of that Sect. which are,—"That, from and after the first day of *August* one thousand seven hundred and eighty-six, it shall not be lawful for any officer or officers of his Majesty's Customs in *Great Britain* to permit or suffer any ship or vessel to be cleared out for foreign parts, from any port or place whatever in *Great Britain*, until the master, or other person having or taking the charge or command of such ship or vessel, and the mate of such ship or vessel, shall severally and respectively give security to his Majesty, his heirs and successors, by bond, in the penalty of two hundred pounds (which security shall

A motion cannot be made, in arrest of judgment, on a *scire facias*, after the first four days of Term.

1816.

The KING v. M'LEOD.

It was tried before the Lord Chief Baron, at the Sittings after *Trinity* Term, when a verdict was taken for the Crown, with liberty to move to enter a verdict for the defendant, on objection taken at the trial on the construction of the statute.

The suit was founded on a charge of the master having fraudulently unshipped goods, with intent to defraud the customs; and that was clearly proved and admitted. But it was also proved and admitted, that the bond in question had been given by the master, on the vessel clearing out at the port of *London* for foreign parts, on the 13th *August* 1814;—that she was then bound to *St. Petersburgh*, and performed that voyage;—that she then

shall be taken by the Collector, or other principal officer of the Customs, at such port or place, who is hereby authorized and required to take such security), with condition that such master, or other person having or taking the charge or command of such ship or vessel, or such mate, as the case may be, will not at any time thereafter land, or cause to be landed, any goods in any part of this kingdom, in any manner which is or shall be prohibited by law, or take the same on board, in order to their being so landed, nor be anywise concerned, or aiding or assisting in fraudulently importing, unshipping, or landing the same, and will not hinder, molest, or oppose, any of his Majesty's officers of the Customs or Excise, or any other person or persons assisting them, or either of them, in the due execution of their respective offices or employments; or until such master, or other person having or taking the charge or command of such ship or vessel, shall produce a certificate, under the hand of the Collector, or other principal officer of the Customs, at some other port or place in *Great Britain*, of such security having been before given at such other port or place, to such Collector or other principal officer, by such master and mate."

returned

1816.

The KING v. M'LEOD,

returned to *Lynn*, and having sailed to *Shields*, took in a cargo of coals, with which she arrived in *London*;—that from *London* she afterwards proceeded on a voyage to *Pernambuco*, and during that last voyage it was that the smuggling took place.

On that evidence the objection taken was, that the bond was confined to the first voyage, and that therefore the Crown could not put it in suit for any breach of the condition alleged to have been committed on any subsequent voyage; and on that ground,

Pell, Serj', obtained a rule to show cause why the verdict should not be setaside, and judgment entered for the defendant.

The *Solicitor General*, *Dauncey*, *Clarke*, *Walton*, and *Roe*, showed cause. They admitted that on a change of master, a new bond would be necessary, and that the bond given did not affect the master when in command of any other ship; but they insisted, that so long as he should continue master of the same vessel, the bond remained in force during the whole time, and for whatever voyages he might make, as appeared both by the construction of the words of the act and the terms of the bond. The last provision of the act, particularly, shows that the legislature did not mean to impose on the master the troublesome necessity of entering into a fresh bond on every voyage, and therefore it enacts, that a certificate of such bond

1816.

The KING v. M'LEOD.

having been once given at some port from which he shall have cleared out, shall be sufficient to entitle him to clear out at any other port; which could have no other meaning than that by having made one voyage out, the bond then given would entitle him to make another; for having cleared out at one port, she would obviously not require to clear out at any other for that same voyage. The terms of the condition of the bond are, that "he will not at any time hereafter," &c. not "at any time during the voyage." The bond, therefore, is not taken with reference to the particular voyage, but to his having charge of the particular ship, and is a continuing bond during such his charge, and would cover all voyages made in her by him indefinitely. The object of the statute, its language, and the terms of the bond, are all general; and there are no words restraining or limiting either. The usage also, which is much, in construing these acts, is, not to take fresh bonds on every voyage.

Pell, Serj^{t}, and *Lawes*, *E.* in support of the rule, contended, that if the construction put on the act by the Crown were the true one, it would continue the master's liability on this sort of bond, not only on any voyage, but with any other ship; for the words do not limit expressly his liability even to the time of his commanding the ship, and that proposition, there is no doubt, would not be tenable. By the 32 *Geo.* III. ch. 50, § 9, coasting vessels are put on the same footing with vessels bound on foreign voyages, as to the necessity of these bonds; but

1816.

The KING v. M'LEOD.

but in those cases the penalty is only 100*l.* Now, when this vessel proceeded from *Lynn* to *Shields*, it cannot be contended that this bond covered that intermediate voyage. Nor can it be supposed that the legislature should intend that one single bond, in so small a penalty, should cover all the breaches of the condition which the master should commit during every voyage he might make. They submitted, therefore, on the whole, that from the general policy of the statute, as well as from the true construction of the words, it was obviously the intention of the framers of it, that the master should give a bond of this description on every voyage which he should make to a foreign port while having the command of the ship, and that therefore each bond could only be considered as relating to each voyage, and would end with that voyage; and whatever might be the usage in respect of taking a fresh bond every voyage, that would be no argument either way as to the true meaning of the act; and, in point of fact, that often became a question between the masters of ships and the collectors of the customs at the ports.

The *Solicitor General* replied.

THOMSON, *Chief Baron*. There has certainly been great ingenuity displayed by the Counsel who made this motion originally, and have attempted to support the rule; but on the best consideration I can give it, I am clearly of opinion that the action brought on this bond may be well maintained. It was a bond given under the directions of the 20th *Geo.* III. to suppress the clandestine re-landing

1816.

The KING v. M'LEOD.

of goods shipped for foreign parts.—[*Here his Lordship read the section, and the condition of the bond,* (observing, that the words "such port or place" must be taken to mean the port at which the clearance for foreign parts from thence is to be allowed,) *and the provision relating to the production of the certificate; and then recapitulated the circumstances of the case, as stated.*]

The question on the case for judgment is, Whether the bond so given is to be confined to the voyage made on the clearing out, when it is given; or, whether it is not to be extended to all the voyages which the obligor shall make as master of that ship.

I certainly agree, that when his character of master of that ship is at an end, the obligation of the bond ceases; but there is nothing, on the other hand, in the act, which confines it to the first subsequent voyage which the ship makes. The terms of the act are general; but the provision, that a certificate of the necessary security having been given shall suffice to entitle the ship to clear out at another port, is quite conclusive, and explains the meaning of the act; for that would be idle, if fresh bonds were necessary: and it would be mischievous if it were not so; for it would be most burthensome to masters of vessels to subject them to such formalities. I am of opinion, therefore, that this bond covers the illegal transactions of the master on this subsequent voyage, and that the Crown is therefore entitled to retain its verdict.

GRAHAM,

1816.

The KING v. M'LEOD.

GRAHAM, *Baron*, expressed himself as of the same opinion, giving the same reasons, and dwelling on the terms of the act, and particularly on the provision regarding the certificate.

WOOD, *Baron*, absent.

RICHARDS, *Baron*, concurred.

Per Curiam,

Rule discharged.

The defendant's Counsel *(Lawes)* then applied for leave to move in arrest of judgment.

The *Solicitor General* objected, on the ground that such a motion ought to have been made within the first four days of term, and that it was therefore now too late. The only course that could now be taken was, by writ of error; and though the consent of the Attorney General would be necessary in that case, he intimated, that if any point really arguable was raised, that consent would not be refused.

The Court said, that the present application was quite irregular after the first four days of the term, and that they could not grant the indulgence unless by consent.

1816.

Thursday, 21st November.

WOLLEY *v.* HADFIELD and others.

A modus of 2*l.* 8*s.* 1*d.* payable for certain tithes within a township, the occupier of each farm or tenement within the said township respectively, paying his rateable proportion, is bad for uncertainty, even in an answer. It is defective in form and substance.

Neither can it be treated as a composition.

TO this (rector's) bill for tithes, the following modus was (amongst others which were afterwards given up) pleaded by the defendant, "That "from time immemorial, there hath been payable "and paid, and of right ought to be paid, at or "about the Feast of *Easter*, or when lawfully de- "manded, to the person entitled to the tithes of the "said rectory or parsonage, as a modus or cus- "tomary payment, in lieu of the tithe in kind of "corn and hay, and of agistment tithe, yearly aris- "ing, growing, and renewing within the two seve- "ral townships of *Matley* (save as aforesaid) and "*Longden*, the respective sums of money next "hereinafter mentioned, to wit, within the town- "ship of *Matley* (except as aforesaid), the sum "of 9*s.* 2*d.*; and within the township of *Longden*, "the sum of 2*l.* 8*s.* 1*d.* the occupier of each farm "or tenement, within the said township respectively, "(except as aforesaid), paying his rateable and "proportionable part of the said modus or cus- "tomary payment due from the township in which "the farm or land occupied by him is situated." It was objected to, for uncertainty, in not stating by whom it was to be paid, or in what proportions for each farm.

Wetherell and *Spence*, for the defendants, contended, that proof of the immemorial payment of the

the sum of 2*l.* 8*s.* 1*d.* would, notwithstanding the objections taken, substantiate the defence, as to those of the defendants who have regularly paid their contributory share of the modus set up, who contend that they are therefore entitled to exemption. They admitted that there were some uncertainties in the modus, as laid, but urged, that as this was the case of an answer, where the same strictness was not required as in a bill, there are several authorities which support moduses laid with as great uncertainty as the present. And they cited *Atkins* v. *Hatton (a)*, and *Atkins* v. Lord *Willoughby de Broke (b)*, where the Court held that the modus set up, and objected to as being laid with too great uncertainty to found a decree, was (although that might be so, if it had been so laid in a bill to establish it) sufficient for the Court to proceed on; for, in an answer where so much strictness is not requisite, it is enough if there appears to be a good defence. So here, if the payment be proved, the validity of the defence should be inquired of by a jury. And in *Markham* v. *Laycock (c)*, the Court said, that customary payments pleaded, and being likely to be made out in evidence, were to be treated with some degree of indulgence; and it might be sent to a jury, who might negative the inaccurate modus, and find the true one. All the objections made to this modus, were also decidedly overruled in the case of *Hardcastle* v. *Sclater (d)*,

(a) 2 Anstr. Gw. 1406.
(b) Gw. 1412. Anstr.
(c) 4 Gw. 1339.
(d) Ib. 1342. Gw. 790.

1816.

WOLLEY v. HADFIELD and others.

where the uncertainty was said to be accountable for, by reason of the probability that the tract prescribed for had been originally the property of an individual, and that the subsequent alteration of that property, ought not to have the effect of destroying the modus.

Martin, *Clarke*, and *Dowdeswell*, for the plaintiff, were not called on to reply.

THOMSON, *Chief Baron*. I put this question: —Can any evidence help this modus, which is not only defective in point of form, but also in point of substance? This is not like any other case that I ever saw or heard of; it is a modus to be paid by the township, the occupier of each contributing his proportion. Now, by what reference, or by what means, is that proportion to be ascertained? Is it according to the rate or value of the land? And how is that to be ascertained, or to be made known to the clergyman?

The defendant's counsel were perfectly right in saying, that there is not the same strictness of precision required in laying a modus in an answer, as in a bill; but still there must be some degree of certainty as to the means of collecting it, and how it is to be paid, and from whom to be demanded. The cases cited, are quite different; this uncertainty seems to belong to no modus whatever. It seems to me this modus is intrinsically bad, and that it is impossible to make it good for any thing.

GRAHAM, *Baron*. I entirely concur with my Lord

Lord Chief Baron. It seems to me impossible that this modus can be supported. There is nothing which shows how the rector's right to recover the 2*l.* 8*s.* 1*d.* is to be enforced. It neither states by whom it is payable, or the respective contribution of each individual towards making up the amount within themselves; and even that would require it to be shown, further, to whom the owner of the tithe was to resort for his remedy, in case the payment were resisted. You tell him he is to have his proportionable part from this or that occupier, but what proportionable part has he a right to demand of each? And, as my Lord Chief Baron asked,—how is he to ascertain how that can be come at?

RICHARDS, *Baron.* I think the very statement, upon the face of the modus, is against it.—[*His Lordship read the words of the modus, as set out above.*]

The very reading of the words, as it seems to me, furnishes the obvious objection to it, without more, and puts this modus out of all question.

It was then submitted, that the defendant might insist upon this payment, as being a composition, requiring notice to determine it.

But the Court decided, that it could not be so considered, and for the same reasons as determined the rejection of it as a modus, for its uncertainty applied equally to its destruction when considered as

1816.

WOLLEY v. HADFIELD and others.

as a composition, as it was not stated what the composition was, or with whom it had been made, or in what proportions it was to be paid.

4th of Feb 1822

1816.

Friday, 22d November.

BOWMAKER *v.* MOORE, SHIRREFF, and TRELFS.

The Court will grant an injunction to restrain a landlord from proceeding at law on an assignment of a replevin bond *against the sureties*, if there have been an agreement to refer, and a reference between the landlord and a tenant (without the concurrence of the surety) of the matters in difference, *whereby the performance of the condition of the bond* (to proceed with effect) *have been suspended.*

MARTIN and *Tinney* moved, that the defendant *Moore* might be restrained (by injunction) from proceeding at law, in an action commenced in the Common Pleas, against the plaintiff, on a common replevin bond.

The material facts, as stated in the bill, and admitted in the answer of *Moore*, were,—that at the time when the plaintiff (as co-security with defendant *Trelfs*, for defendant *Shirreff*) executed the replevin bond, dated 3d *February* 1814, which was upon a distress levied for one year's rent, (19th *January* 1814,) disputes were pending between *Moore* (the landlord) and *Shirreff*, (the tenant,) respecting the terms of holding the same, and otherwise relating thereto; and that another action of

On such an agreement having been entered into, the bond became *functus officio.*

replevin

replevin was then pending for the rent of a former year;—(the answer stated that *Moore* did not know whether the plaintiff, when he became surety, was or was not acquainted with these facts;)—that after the plaintiff had become surety, *Moore* and *Shirreff*, by an agreement dated 23d *March* 1814, agreed to refer the matters in dispute between them to arbitration. The terms of the agreement (as they affected this motion) were, "That *Shirreff* "should be allowed to deduct all monies which "should be awarded to him, in respect of his claims, "out of the arrears of rent due and to become "due;—that the arbitrators should appoint a day "for payment of the rent, or the balance thereof;— "that nothing therein contained, should be con- "strued so as to prejudice the distress made on the "19th of *January* 1814; *or to discharge the* "*sureties of Shirreff, in the replevying of such dis-* "*tress*; *and that pending the aforesaid reference,* "*no proceedings should be taken in the action of* "*replevin, upon such distress.*"—That the agreement was proceeded upon, and the plaintiff was not, in any measure, apprized of it;—that pending the reference, the plaint, in replevin, was removed by the defendant *Moore* into the Common Pleas by mistake;—that on being reminded of the agreement, he suspended proceedings during the reference;—that *Shirreff* did not pay the sum awarded;—that he afterwards confessed the action, admitting *Moore*'s right to distrain; and authorized him to enter up judgment of *non pros.* unless he should pay the rent by the first day of *Michaelmas* Term;—that judgment was accordingly entered up,—a writ *de retorno*

1816.

BOWMAKER v. MOORE and others.

retorno habendo sued out,—and an eloignment returned;—upon which the defendant *Moore* procured an assignment of the bond, and commenced the action in question. In the mean time, *Shirreff*'s goods had been taken in execution by *Moore*, for the former rent. It did not appear whether, if the agreement to refer had not been entered into, the defendant *Moore* could have obtained his judgment of *non pros.* sooner than he did.

On these facts it was submitted, that the suit having been delayed by the subsequent conduct of the defendants *Moore* and *Shirreff*, (by their agreement entered into, without the privity of the surety, who was materially interested,) he was thereby discharged from the obligation of the bond; the condition, (that the defendant *Shirreff* should prosecute his suit with effect,) having been put out of his power, by the defendant *Moore* himself. And it was contended to be immaterial, whether the surety had or had not sustained any actual damage, by the change of his situation, without his own consent, (although it was admitted, that certain facts in the case showed that damage had, in this instance, been sustained;)—it was enough, that the surety's right to force his principal to bring the question in dispute to an immediate determination, that so he might be discharged from his liability, had been suspended by the act of the creditor. They cited various cases on the doctrine of discharge of the surety, by time given to the principal; and, amongst others, *Croft* v. *Johnson* (*e*), in which the

(*e*) 5 Taunt. 319.

doctrine

doctrine of discharge of bail by a *cognovit*, given by a defendant to the plaintiff, (see *Hodgson* v. *Nugent*, 5 T. R. 277, and *Thomas* v. *Young*, 15 E. R. 617,) had been put on its true footing:— and particularly *Boultbee* v. *Stubbs (f)*, in which the Lord Chancellor had granted an injunction against suing the surety in a bond, where the obligee had taken a mortgage from the principal for part of the debt, and agreed to receive the rest by instalments, *expressly without prejudice to any security which he held for the debt, or any part of it.*

Rowpell, contrà, contended that this was not the common case, of time given to the principal, to the prejudice of the surety. The plaintiff was surety for *Shirreff*, to the Steward of the Liberty, not to *Moore*; and there was no privity between him and *Moore*;—that *Moore* had nothing to do with *Bowmaker*'s knowledge or ignorance of *Shirreff*'s situation;—that there had been, in fact, no injurious delay; and, in the agreement of reference, between *Moore* and *Shirreff*, the remedy against the surety was expressly reserved;—that *Moore* was not bound to give notice of former distresses, or actions of replevin then pending, to *Bowmaker*. He could not have proceeded on the bond, till it was assessed by the steward: and the reference has not deprived the surety of any advantage which he would otherwise have had; or placed him, in any respect, in a worse condition.

Per Curiam.—This question lies in a narrow

(f) 18 Ves. 20.

compass.

1816.

BOWMAKER v. MOORE and others.

compass. The bond was (of course) conditioned,—that the principal should prosecute his writ, with effect, against the landlord. The action of replevin is in fact entered; but, afterwards, an agreement is entered into between the landlord and the tenant, without the concurrence of the surety, whereby the tenant is precluded from proceeding according to the condition. By that agreement, a mode is chalked out for ascertaining and arranging their mutual demands, and, in the mean time, all proceedings are to be stayed; so that the tenant is restrained, by the act of the landlord, from doing that which his surety has engaged he shall do. It turns out, indeed, that the same parties afterwards agree, that the action shall proceed, so as to give the landlord his original remedy against the surety: —but that is what we cannot suffer, after what has been done. When the agreement of reference was executed, the bond, as against the surety, was *functus officio*.

Injunction granted *.

* See *Moore* v. *Bowmaker*, 6 Taunt, 379. 2 Marsh, 82 & 392.

EASTMOND

1816.

Friday, 22d November.

EASTMOND *v.* HOLL.

THE plaintiff having obtained a verdict in this cause, (which was debt on bond, dated, 19th *February* 1793,) for the principal and interest then due; exceeding, in amount, the penalty, which was 100 *l.*;

The Court will not refer it to the Master to take an account of what is actually due on bond for principal and interest, and costs, *after a verdict for the plaintiff*, on the bond having been put in suit.

Gifford now moved that it might be referred to the Master, to take an account of what was due to the plaintiff, for principal and interest on the bond, and for costs;—and why, upon payment into Court of the balance of such principal, interest and costs, the bond should not be delivered up to be cancelled, and satisfaction of the judgment entered;—and that proceedings, in the mean time, might be stayed, on bringing the penalty into Court.

The affidavit of the defendant (who was surety for his deceased brother) stated, that before the action was brought on the bond, he received a letter from the plaintiff's attorney, demanding the money stated to be then due, for the principal and interest on the said bond, amounting to 100 *l.*; "out of which, (the letter added,) "I believe you have paid, in "cash and cattle, about 30 *l.*"—That in the progress of the cause, oyer of the bond was demanded, and given; and that, on the production of the bond, there were certain credits for interest, written on the said

1816.

EASTMOND v. HOLL.

said bond, and also the following words and figures in pencil:—

3 Bullocks - - -	£. 12	0	0
6 Sheep - - -	15	0	0
	27	0	0
Cash - - -	12	0	0
	£. 39	0	0

which entry in pencil, the defendant considered as a credit in his favour, strengthened by the terms of the said letter;—that defendant relied on said pencil memoranda appearing on the said bond, at the trial of the cause, but that the same were then found to be rubbed off, and obliterated; and that he believed he was entitled to credit for the delivery, by his said brother, of the said items. The affidavit of the defendant's agents, corroborated the existence of the said items of credit, in pencil, as stated by defendant.

It was admitted, that the present motion was novel, after verdict; and that though the statute of the 4th *Anne*, ch. 16, scc. 13, had authorized such application pending suit, there might be some difficulty, on the ground of delaying the plaintiff's execution. But it was urged that the present was a proper case for the interference of the Court, if they should consider that they had jurisdiction.—The plaintiff had not entered up judgment, and the Court might exercise a controul over their process in furtherance of justice.

Sed

1816.

EASTMOND v. HOLL.

Sed, per Curiam.—The present summary motion would, if granted, clearly operate to delay the plaintiff; and if it could be done, such applications would have been numerous. Another objection arises in point of time. The defendant now seeks to do what he might have done before, when he would have saved to the plaintiff much trouble and expense.—We should, therefore, be unwilling to make the precedent.

Motion refused.

1816.

Saturday, 23d November.

The ATTORNEY GENERAL *v.* LARAGOITY.

The Court will not postpone the trial of an information on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think that there have been sufficient time for its return.

IT was moved on the part of the defendant, to postpone the trial of this information, on the ground of the commission which had been granted to examine his witnesses at *Corunna*, had not been yet returned.

Per Curiam.—There has been time enough for the return of a messenger; and in a matter of such importance to the defendant, the depositions ought to have been here. The interrogatories must lie in a very narrow compass, as they chiefly relate to public documents. There is no statement made in the affidavit, that there is any expectation of

It should be stated in the affidavit, in support of such an application, that the return is expected, and when.

1816.

ATTORNEY GENERAL v. LARAGOITY.

their being forthcoming, or at what time. As to the delay which is charged on the Spanish proceedings, we can take no notice of that.

Motion refused.

1816.

Saturday, 23d November.

HURD *v.* PARTINGTON and BENT.

Where an action at law has been brought on a bail bond, given to the sheriff on an attachment from the equity-side of this Court, for not answering according to the condition, and a verdict have been recovered, if the defendant, instead of pleading the answer put in, pleads *non est factum*, and refuses to settle with the plaintiff by paying the costs pending the action, when he had an opportunity, before the Judge on a summons, this Court will not restrain the plaintiff from taking out execution, (although the defendant has answered since the action brought) but on the terms of all the costs at *law* being paid; notwithstanding the plaintiff has not (as he ought to have done) refused to accept the answer when it came in, till the contempts were cleared, but has actually waived them, by excepting to the answer and amending his bill.

But the Court will not order the defendant (at law) to pay the costs in *equity* also, because they were waived, by the plaintiff accepting the answer.

THE plaintiff had filed a bill against the defendants, and an attachment having issued against them in *Easter* Term last, for not putting in their answer, they, and *Robert Turner*, had given the usual bail-bond to the sheriff of *Lancashire*, in the penalty of 40 *l.*; but at the return of the attachment, their answers not having been yet put in, the plaintiff brought three several actions at law against them on their bond in the Court of Common Pleas, in the name of the sheriff. On the 20th *June* the defendants, having filed their answer, and on exceptions taken, submitted to answer further, the plaintiff, on the 22d *July*, obtained an order to amend his bill, and that the defendants should answer

the

the exceptions and amendments at the same time. The bill having been amended, the plaintiff countermanded his notice of trial in the actions on the bail-bond against *Bent* and *Turner*, but intended to proceed to judgment and execution against *Partington*. The plaintiff had obtained a verdict.

Under these circumstances *Dauncey* and *Martin* obtained, on the 16th *November*, an order on the plaintiff to show cause why he should not be restrained from so proceeding, on the ground that the object of the bond had been satisfied, by the answer having been subsequently put in, and having been accepted by the plaintiff, he had waived the objection of the defendants, not having cleared their contempts.

[The Court expressed a doubt as to the ground of the actions in the Common Pleas, the bond being conditioned that the defendant shall appear and answer, and intimated that the course was, on the condition being broken, to get an order, on the return by the sheriff, of *cepi corpus* for a messenger to bring the defendant in.]

Clarke and *Agar* now showed cause. They submitted, that the conduct of *Partington*, who was an attorney, was most reprehensible, in having thrown every obstacle in the way of the plaintiff, and delayed him to the last moment in the equity suit, by having pleaded *non est factum* to the action. He had not (as he should have done) taken out a summons to stay proceedings on his answer being

1816.

HURD v. PARTINGTON and BENT.

being filed, and therefore he ought to pay the costs incurred in the action which had been tried.

As to the right of action, they cited the case of *Morris* v. *Hayward (a)*, where it was held on demurrer, that an action on a bond to the sheriff, under an attachment out of the Court of Chancery, was maintainable.

It was stated, from an affidavit made against the rule being made absolute, that Mr. Justice *Borrough* had refused, on summons, to consolidate the three actions, but offered to make an order to stay proceedings in all, to give the defendants an opportunity of settling them in the mean time, by paying the costs, and withdrawing his plea of *non est factum*.

Dauncey and *Martin*, in support of the motion. The Court will not encourage the course of bringing three several actions in a case of this sort. The sheriff is to be protected, in whose name the actions are brought.—The plaintiff should have made the costs at law the ground of an integral objection to accepting the defendant's answer when it came in, and the Court would not have suffered him to clear his contempt, till the costs had been paid. The plaintiff has taken a wrong course, and must abide by the consequences.—They were not warranted in bringing any action, but should have proceeded in this Court in the usual manner on the attachment, and have got a return of *cepi corpus*, and a messenger.

(a) 2 Marsh. 280.

THOMSON,

1816.

HURD v. PARTINGTON and BENT.

THOMSON, *Chief Baron.* The question here is, as to the right of the plaintiff at law, and defendant in equity, to have the costs of these proceedings which have been had on the bail-bond. Those proceedings were necessarily carried on in the name of the sheriff, and the plaintiff at law was certainly justified in bringing the action, no answer having been put in whereby the condition of the bond was broken. The defendant might, perhaps, have pleaded compliance, but he chose to give the plaintiff trouble, and therefore pleaded *non est factum.*—On the summons for consolidating the actions, he had an opportunity of making an arrangement, on paying the costs, which he refused. Now the plaintiff must not entirely lose these costs, for the proceeding was rendered necessary to compel an answer.

The costs in equity, he has certainly waived all right to, by accepting the answer.

The costs at law, however, are on a different footing: to those, I think, the plaintiff is entitled, and therefore the defendant must pay them.

GRAHAM, *Baron.* There is a slight shade of difference in the opinion which I have; notwithstanding the conduct of the defendant, who is an attorney, by standing out as he has done, and trusting to contrivances to get rid of the bond, excites much indignation. It appears to me, that the plaintiff has not done what, by the practice of courts of equity, he was bound to do.—For when the answer

1816.

HURD v. PARTINGTON and BENT.

of the defendant came in, he should have refused to accept it, till the costs at law had been paid, when they would have been within the reach of the Court, who would not have suffered him to clear his contempts, until those costs had been paid. The plaintiff might then have moved to take the answer off the file, and that it might not be suffered to be restored till the contempts had been cleared.

Though I think that bringing three actions was not right, yet, under all the circumstances, I think we should not restrain the plaintiff from proceeding, until all the costs shall have been paid.

WOOD, *Baron*, absent.

RICHARDS, *Baron*. I agree with my Lord Chief Baron, that all the costs at law ought to be paid. I have never known any such application made to the Court as that suggested by my brother *Graham*. The party applying has conducted himself improperly certainly, and that is an additional reason why the Court would not be disposed to interfere.

Order made absolute.

All the plaintiff's costs at law to be paid him by the second day of the Sittings, or the plaintiff to be at liberty to move to dissolve the injunction.

GRAHAM

GRAHAM and others, Assignees of LEIGH, a Bankrupt, *v.* RUSSELL.

1816.

Monday, 25th November.

An underwriter is entitled (where the assured has become bankrupt after the policy of insurance was effected) to deduct what was due to him *before* the bankruptcy, on a balance of accounts between the assured and himself, from out of the amount of his subscription to the policy, in the event of a loss *subsequent* to the bankruptcy, under the 5th *Geo.* II. ch. 30: the statute 19 *Geo.* II. ch. 32, sec. 2, suspending the effect of a bankruptcy in the case of an assured and the underwriter, *on both sides*, so as to let in the former statute, till the result of the voyage shall have been ascertained, and the accounts stated: because the 19 *Geo.* II. c. 32, (admitting persons assured to claim losses against bankrupt underwriters, although happening after the bankruptcy,) is in *pari materiâ*, and the two statutes are to be construed with reference to each other, so as to make them *mutually* beneficial; and *therefore* it was held that a set-off must be allowed to a solvent underwriter, by the assignees of a bankrupt assured, under the 5 *Geo.* II. ch. 30.

THE plaintiffs had brought an action of *assumpsit* on a policy of insurance, on the ship *Vedra*, against the defendant. The interest was averred, in one count of the declaration, to be in *Leigh* up to the time of the bankruptcy, and since, in his assignees: in another, it was averred to be in *Leigh* (only). The money counts were laid in the name of *Leigh* before his bankruptcy, and in the names of his assignees, since. The plaintiffs recovered a verdict (damages 200*l.*) at *Guildhall*, at the sittings after *Hilary*, 1814, before Lord *Ellenborough*, subject to the opinion of the Court of King's Bench, on the following case:—

"The plaintiffs are assignees of the estate and effects of *John Leigh*, a bankrupt, under a commission of bankrupt, issued on the 11th day of *August* 1811, upon an act of bankruptcy committed on the 9th day of that month.—*John Leigh* was a merchant and owner of the ship *Vedra*, and he was also an insurance broker.—On the 31st day of *July* 1810, he effected the policy in question at *Lloyd*'s, on his own account, and which was

1816.

GRAHAM and others v. RUSSELL.

subscribed by the defendant, at a premium of ten guineas per cent., with a stipulation for returns, not material to the present case. The policy contained the usual acknowledgment, by the defendant, of the receipt of the premium; but the premium was not in fact paid to the defendant, but was carried by the defendant to the debit of an account subsisting between him and *Leigh*, in respect of other policies effected by *Leigh*, partly as broker, and partly on his own account.—The *Vedra* sailed in prosecution of her voyage in *September* 1810, and was captured on her homeward voyage on the 24th day of *November* 1811.—At the time of the bankruptcy of *Leigh*, he was indebted to the defendant in the sum of 128*l.* which was made up of the premium on the policy in question, and of the premiums of other policies effected by *Leigh*, partly as broker, and partly on his own account; and *Leigh* at that time had credit with the defendant for 19*l.* 19*s.* 11*d.* for returns of premium and settlements of general average, leaving a balance of 108*l.* 0. 1*d.* then due from *Leigh* to the defendant.—The defendant refused to pay the loss upon the policy in question, contending, that he had a right to set off the 108*l.* 0. 1*d.*, the balance due to him from *Leigh* at the time of his bankruptcy, or that, at all events, he was entitled to set off, or retain the premium on the policy in question."

The Judges differing in opinion on the argument, in the next *Easter* Term, it was sent up, by their desire, to the twelve Judges in the *Exchequer* Chamber, and came on in *Easter* Term last, when

Littledale,

1816.

GRAHAM and others v. RUSSELL.

Littledale, on behalf of the plaintiff, submitted that the sole question was, Whether the plaintiffs were entitled to the whole of their demand of 200*l.*; or, whether the defendant was not entitled to deduct the sums due to him on the balance of accounts subsisting before the bankruptcy, on the ground of a mutual credit, whereby he was protected from the operation of the bankruptcy of *Leigh*, by the statute 5th *Geo.* II. ch. 30, sec. 28*? That would depend on, whether the transactions between these parties amounted to what might be deemed a mutual credit, within the meaning of the act. In this case they did not: the whole rested on contingency. The debt, such as it was, was neither certain or reducible to a certainty: nor could any account have been stated between the parties, on which a balance might have been struck. A debt must be in a sum certain. Here, it was doubtful whether a debt would ever arise at all; and if it should, to what extent, and at what time. It is even more uncertain than a debt arising on a *quantum valebant*; for that may be ascertained, and at some definite period.—

* "And be it further enacted by the authority aforesaid, that where it shall appear to the said commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively."

The

1816.

GRAHAM and others v. RUSSELL.

The same uncertainty destroys the positive existence of a precise credit, which should be something, at least, in the *nature* of a debt. When the assignees became possessed of this policy, they obtained merely a remote possibility on which a future contingent credit, depending wholly on chance, might at some time arise. The 28th section of the statute is applicable only to the situation of the parties at the time of the committing the act of bankruptcy; and if there existed not *then* between the parties a positive credit, capable of being defined, it could not be brought within this statute. In the case *ex parte Groome (a)*, Lord *Hardwicke* says, (speaking of this statute)—"Suppose a debt due "from Mr. *Groome* to the bankrupt before his "bankruptcy, and that the bankrupt owed him a "debt on bond upon a contingency that took place "after the bankruptcy, would it not be a great "hardship on the rest, that such creditor should be "at liberty to set off?"

The cases of *Dobson* v. *Lockhart (b)*, and *Hancock* v. *Entwistle (c)*, were also cited to the same point; and more particularly that of *Glennie* v. *Edmunds (d)*, as quite deciding the present case. It will perhaps be contended, (it was urged) that that case is not law, or that this is the case of a trust; but if so, can it be contended that all trusts come within the act? and the argument, if good, must go so far. Besides, if the bankrupt were a trustee, the assignees can have no interest; and if they had

(a) 1 Atk. 119.
(b) 5 T. R. 138.
(c) 3 T. R. 435.
(d) 4 Taunt. 775.

received

1816.

GRAHAM and others v. RUSSELL.

received money under the trust, it would be for the use of those entitled under it. There are cases of trusts where the doctrine of mutual credit has been acted on; but all those are cases of pecuniary transactions between the parties, and of credit absolutely created by money, not goods. Where personal chattels are entrusted to a person to be sold, a foundation of credit is certainly laid; but no actual credit arises till the goods are sold. And in this case, nothing of a pecuniary nature arose between the parties, so as to establish a mutual credit, till the loss, and that was after the bankruptcy.

[ELLENBOROUGH, *Lord Chief Justice*, suggested, that the case of *French* v. *Fenn (e)*, was destructive of such doctrine, where the mutual credit was absolutely created by the bankrupt entrusting the defendant with the possession of the pearls to be sold, he being at the same time indebted to the defendant, for his share of the purchase-money, which the defendant had advanced.

GIBBS, *Chief Justice*. It is impossible to contest the proposition, that goods being entrusted to another to be sold by him, for the benefit of the person depositing them, creates a credit: the fallacy of the argument lies in assuming that no credit arises until the goods are sold.]

The credit on the policy was, *in invitum*, as against *Russell*, who was to pay the amount of the

(e) Coke's Bankrupt Law, 555. 6th ed.

sub-

1816.

GRAHAM and others v. RUSSELL.

subscription, which distinguishes this from the case of *French* v. *Fenn*, and the other cases, where the party has a chattel, with which he is to do something in favour of the bankrupt, and for which purpose he is entrusted with the possession of it. The last case on the subject, is that of *Olive* v. *Smith (f)*, where the doctrine of trusts was much discussed.

[GIBBS, *Chief Justice*. Two questions arose in that case,—first, Whether the broker was entitled to a *lien?* and if not, Whether it was not a case of mutual credit?—I did not chuse to decide whether the balance went beyond the defendant's general brokerage account, but left it to the jury; for if it had been restricted by the agreement, there would have been an end of all notion of mutual credit.]

The distinction in that case is, that the defendants were so far entrusted with the policy, as that they were actually to receive the losses on it.

[GIBBS, *Chief Justice*. The ground on which that case was decided, was, that the bankrupt had entrusted the defendant with the policy, and the defendant the bankrupt with the amount of the money advanced, so that if the assignees had brought trover for the policy, the defendants would not have been obliged to deliver it up, unless the assignees first paid them their debt, for the money and the policy stood in the place of each other.

(*f*) 5 Taunton, 56.

[ELLEN-

ELLENBOROUGH, *Lord Chief Justice.* Where so many trusts are intruded into a case, I should hardly consider it as one of mutual credit. What is the acknowledged distinction between mutual credits and mutual debts? It seems to me, that credit, in the statute, means an inchoate or contingent debt.]

That distinction is to be found in *ex parte Prescot (g).* In all the cases on the doctrine of mere trusts creating credit, if rightly decided, there is nothing which touches this, for here, the defendant is so far from being *a trustee of the policy for the bankrupt,* that he is himself the person against whom it is to be enforced; so that it lays, therefore, not even a foundation for mutual credit. The case of *French* v. *Fenn,* arose on a mutual adventure on a purchase of pearls, and produced a question of set-off; but that was a case of embarking in a speculation of profit and loss, and nothing like this. As to the case *ex parte Deeze,* though approved at the time *(h),* the principle has been subsequently much narrowed, as appears from *ex parte Ockenden (i),* and *Green* v. *Farmer (k),* in which last case the incongruity between the cases *ex parte Deeze,* and *ex parte Ockenden,* is commented on, and the latter doctrine preferred: or that case could not have been decided as it was.

(g) 1 Atk. 230.

(h) *Smith* v. *Hodson,* 4 T. R. 216; and *French* and *Fenn.*

(i) 1 Atk. 235.

(k) Bur. 2215. 1 B. C. 651. S. C.

[GIBBS,

1816.

GRAHAM and others v. RUSSELL.

[GIBBS, *Chief Justice*. The question of mutual credit was never started in *Green* and *Farmer*. The sole question there was, Whether the plaintiff had a general or limited lien?]

The question of mutual credit is certainly the point here; and, whether the dealings of these parties come within the statute 5 *Geo.* II. That statute was not meant to apply to debts depending on contingencies, but to such as were actually in existence, though not recoverable, at the time of the bankruptcy; which is well distinguished by the case of *ex parte Prescott*, otherwise, (or if the class of cases founded on *ex parte Deeze* were correct,) the doctrine of lien in cases of bankruptcy, would be extinguished by that of mutual credit.

Barnewall, contrà, insisted that this was a case of mutual credit within the statute, and submitted that all that it would be necessary to enquire of, to try that proposition was, Whether, in fact, any credit had been given to the underwriters by the assured? He defined credit to be (as the term was used in the act) the reposing a confidence in another's ability and character, in matters regarding money or money's worth. In its etymological sense and popular acceptation, credit signifies confidence.—The credit given to testimony means confidence in its truth. The credit given to a merchant means confidence in his responsibility. Credit of the latter sort, when depending also on extrinsic contingencies, is not the less credit. Those contingencies do not alter the nature of credit, but the degree.

1816.

GRAHAM and others v. RUSSELL.

degree. Thus, a loan of money to be repaid in twenty-four hours, would be a credit; but there is certainly not less credit given to the person whom you place under an obligation to pay you a sum of money in the same time, provided he should live so long. It rather increases than diminishes the credit reposed in him, for confidence is placed in his responsibility, and in his state of health—that credit would be the same in all respects, whether the person were in that time to repay in money or in a supply of goods, and would be equally within the statute, at least, if not more particularly so, as contra-distinguished there from debts, and mere pecuniary engagements. As much beyond the period of twenty-four hours as the person under obligation to pay is trusted, so much greater the credit.—Credit expires by efflux of time, where it depends on time, but not till the accident of the contingency, where it is founded on contingency, being either more or less in one case than the other, according to the nature of the particular contract. The advantages of commerce arise out of contingencies, and so do its failures, as far as the individuals are interested, and that consideration was probably the foundation of this statute for the encouragement of speculation, for the general good of trade. It has been said that there is no credit given where the event depended on a contingency: if that were so, there would be no credit in the common cases of bottomry and respondentia bonds, the payment of which depends on the arrival of the ship and goods. That is clearly a contingency; yet there is no question but that there, there is a credit created by such instruments—the one

1816.

GRAHAM and others v. RUSSELL.

one party has confidence that the other will fulfil his obligation if the ship arrives. So it is with an assured, with respect to his underwriter. If then the term credit be sufficiently comprehensive to embrace this case, and if, notwithstanding the contingency, it be applicable to the demand of an assured against the underwriter, the amount of subscription of the latter is reducible by the amount of the balance in his favour, as being a case of mutual credit within the statute. That that act has always received a most liberal construction, appears from the case *ex parte Deeze (l)*. As to what is reported to have been said by Lord *Hardwicke*, in *ex parte Groome*, his Lordship there put the case of a debt, about which there is no doubt; and what he suggested as to the hardship of admitting a debt proceeding from a contingency happening after the bankruptcy, it is enough to say, that it was not said judicially. The case of *French* v. *Fenn*, was also a case depending wholly on contingencies. The pearls were in *England* at the time of the bankruptcy, and the amount of their ultimate produce, when sold in *China*, was altogether uncertain, or whether it would even create a debt; yet that was allowed to be set off.

But the recent case of *Olive* v. *Smith (m)*, is strongly in point, and is completely and decisively in favour of the defendant. There, the trusting a broker with the possession of policies, constituted a credit, notwithstanding the contingency; which

(*l*) 1 Atk. 229. (*m*) 2 M. & S. 112.

ripening

ripening into a debt, after the bankruptcy, became the subject of set-off. And if that was a case of mutual credit within the statute, as between the assured and the broker, *à fortiori* must it be as between the assured and the underwriter, to which latter the credit was in fact given.

In *Koster* v. *Eason (n)*, (confirmed by *Parker* v. *Beasley)* a broker effecting policies in his own name, on account of others, was held to have established a credit between himself and the underwriters. It cannot, therefore, after those cases, be said, that this is not a mutual credit within the 5 *Geo.* III.

Littledale, in reply, contended, that inasmuch as unless a loss had occurred, there would be nothing to be accounted for by the defendant at the time of the bankruptcy, there was then no credit existing; and that distinguished this case from that of *French* v. *Fenn*, where the defendant had been actually entrusted with the possession of the goods at the time of the bankruptcy, for which he was to account, and which were then certainly of some value, though the amount was uncertain, (nor could be reduced to a certainty, till their produce was ascertained by their sale;)—and that distinction was taken by Mr. Justice *Heath*, in *Glennie* v. *Edmunds*, as putting the question, then before the Court, out of the authority of the case of *French* and *Fenn*, there

(n) 2 M. & S. 423.

 cited.

1816.

GRAHAM and others v. RUSSELL.

cited. The case of *Staniforth* v. *Fellowes (p)*, is an authority that this statute is not to be farther extended in its construction, at least than it has been. In the other decisions cited, the broker was entrusted with the policy;—but here, the policy is to be enforced against the party, and he was not entrusted until an event arose, which might never happen. In the case of bottomry and respondentia bonds, there is an actual existing credit.

ELLENBOROUGH, *Lord Chief Justice*, in delivering the opinion of the Court, put the decision of the case entirely on a distinct ground from any which had been taken up in the course of the argument.

Although this case, said his lordship, has been argued as if it were merely a question of mutual credit, and—whether, therefore, the defendant was entitled to set off this demand, under the 5th *Geo.* II. ch. 30; yet, as the 19th *Geo.* II. ch. 32, sec. 2*, (having provided that the assured, in any policy of insurance,

(*p*) 1 Marsh. 184.

* "That from and after the said 29th day of *October*, the obligee in any bottom-ree or *respondentia* bond, and the assured in any policy or insurance, made and entered into upon a good and valuable consideration, *bonâ fide*, shall be admitted to claim; and after the loss or contingency shall have happened, to prove his, her, or their debt and demands in respect of such bond or policy of insurance, in like manner as if the loss or contingency had happened before the time of the issuing of the commission of bankruptcy against such obligor or

1816.

GRAHAM and others v. RUSSELL.

insurance, shall be admitted to prove his debt in respect of such policy, although the loss should not happen till after the bankruptcy,) operates to suspend, as it were, the act of bankruptcy, in favour of an assured trader, till the event of the voyage shall be ascertained, that provision ought to be construed for their mutual benefit; and therefore, if the claim is to be allowed in one case, the set-off must be allowed in the other. The object of the latter statute, was to place the parties in an insurance in the same situation as if the bankruptcy had not happened till after the loss, so as to give the assured an advantage he would not otherwise have had; therefore, in the account between the parties, regard is to be had to the nature of the whole transaction, and not to the side of the account on which the balance appears. So that if the assured be, under the 19 *Geo.* II., entitled to prove a debt due to him, from an underwriter becoming bank-

or insurer; and shall be entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such loss or contingency had happened before such commission issued; and all and every person or persons against whom, from and after the said 29th day of *October*, any commission of bankruptcy shall be awarded, shall be discharged of and from the debt or debts owing by him, her or them, on every such bond and policy of insurance as aforesaid, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such loss or contingency had happened, and the money due in respect thereof had become payable, before the time of the issuing of such commission."

1816.

GRAHAM and others v. RUSSELL.

rupt before the loss happened on which it arose, so ought a solvent underwriter, in the case of an assured becoming bankrupt, to be entitled to set off a debt due to him before the bankruptcy, against a loss happening after it. In this case, the assured was indebted to the underwriter, in a balance of 108*l.* 0*s.* 1*d.*, and became bankrupt before the loss; —his assignees seek to recover the whole amount of the loss,—the defendant claims a right to set off that balance,—and, we think, that under the beneficial construction of the 19 *Geo.* II. the defendant is entitled to deduct the general balance of 108*l.* 0*s.* 1*d.* in his favour, from the amount of his subscription to the policy so due from him on the loss which happened. So far, therefore, the

Verdict to be reduced.

WHITMORE

WHITMORE and others *v.* RICHARD THORNTON, ROBERT THORNTON, WEST, and PREHN.

1816.

Tuesday, 26th November.

THE defendants, who were merchants in *London*, had obtained a verdict at law, in last *Trinity* Term, against the plaintiffs, who were underwriters, for the amount of their subscriptions to a policy of insurance, effected on certain vessels and their cargo, then at sea, (lost, or not lost.) The defendants had brought the action in the name of *Prehn*, a merchant at *Petersburgh*, in whom the sole interest in the ships and cargoes was averred to be. On the 27th *June*, the plaintiffs filed the present bill, to restrain the proceedings; alleging that *Prehn*, the foreign merchant, had, in fact, no interest in the property insured, and that his name was merely used colourably;—that the other defendants, who they alleged were really the owners, knew of the loss of the vessel before they effected the insurance, as would appear by their correspondence, if produced—the production of which, they prayed, might be ordered by the Court. *Richard Thornton* answered the 15th *July*, but the other defendants

The Court will set aside an injunction—(granted after trial and verdict obtained on the ground that one of the defendants (plaintiffs at law) in whom the interest was averred to be, was in contempt for not having answered, and that his answer was most material to the defence at law of the plaintiffs (in equity) to the action, as it might show that the property was not (in truth) in him;)—and that although the affidavit of merits, on which it was obtained, contain allegations of strong facts in support of the plaintiffs' equity; and although the Court of law have since, on the same facts having been brought before them on motion for a new trial, granted a rule *nisi*, against which cause has not yet been shown.

Such an order can only be obtained before verdict; and if obtained after, will be discharged on motion.

Showing cause against a rule *nisi* for a new trial, is not a breach of an injunction.

1816.

WHITMORE and others v. THORNTON and others.

were in contempt. In support of the application for the injunction, an affidavit (sworn the 11th of *November*) was filed, verifying the allegations in the bill, and stating some strong facts, to show that there was good ground for suspicion of unfair dealing on the part of the insured; and that on those circumstances having been brought before the Court, on a motion for a new trial, a rule *nisi* had been obtained;—and, on the 12th instant, this Court granted an injunction, as prayed;—and

Fonblanque and *Raithby* now moved, pursuant to notice, That that injunction might be dissolved; or that the plaintiffs might be directed, within a week, to pay into Court the amount of their several subscriptions to the policy of insurance mentioned in the pleadings;—and that the defendant *Prehn* might be at liberty to show cause against the rule *nisi*.

[THOMSON, *Chief Baron*. It is not a proceeding which amounts to breach of an injunction, to show cause against a rule for a new trial.]

It was submitted, that an injunction should not have been granted in a case like this, after trial and verdict; or, if it were consistent with the practice of the Court, it ought to have been on terms of bringing the money into Court. All the facts detailed in the affidavit, were strongly urged at the trial; and yet the jury found for the defendants, (the plaintiffs at law). As to *Prehn*'s answer not having come in, it is the plaintiff's fault that it is not

on

1816.

WHITMORE and others v. THORNTON and others.

on the record; for he has not used all due means and diligence in getting it. If he had applied for the injunction before, that proceeding alone would most probably have produced the answer. And if the answer had been so material to their defence, they should have got the injunction, to stay the proceedings at law, till it should have come in, in proper time,—*before the trial.* They had no right to wait till they had taken the chance of a verdict, and possessed themselves of the defendant's case. If it were practicable to obtain an injunction, merely for want of a defendant's answer, a defendant at law might, in some cases, have as many trials as there were defendants in equity, if they should answer successively.'

[GRAHAM, *Baron*, observed, that it was not unusual to grant injunctions for want of answer, even after verdict; and alluded to the case of *Kensington* v. *White (a)*.]

But it was observed that, in that case, the plaintiffs had brought the money into Court, and very few of the many actions there pending had then been tried. The defendant, too, was constantly abroad in that case; and the delay of his answer coming in was not sufficiently accounted for;—that was therefore a very peculiar case.

Here, the plaintiffs having elected to let the proceeding at law take its course, must now abide by

(a) Vide ante, p. 164.

1816.

WHITMORE and others v. THORNTON and others.

the result, (*Barlow* v. *Brent,*) (*b*); unless in cases where new matter of defence has been subsequently discovered, and then the Court will sometimes interfere. The sole object of the injunction in this case is for delay.

Dauncey and *Winthrop* opposed the motion.—They admitted that *Prehn*'s answer was material, and that, before verdict, the application for an injunction, on a proper affidavit of merits, would have been almost of course. There is (as is admitted) nothing but the trial, which has been had, that furnishes any objection to this motion. It was so, however, in the case of *Kensington* v. *White*, where an injunction was granted by this Court, notwithstanding a trial had been had. Here, too, it is a strong circumstance, that the proceedings at law are not yet at an end; for a rule having been obtained, to show cause why the verdict should not be set aside, and a new trial granted, is the same thing as if there had been in fact no trial. In this case, too, the defendants, who have not answered, are abroad:—*Prehn* is at *Petersburgh*, and *Robert Thornten* and *West*, in *Flanders*. As to paying the amount of the subscription into Court, if the Court so order it, it must certainly be done.

THOMSON, *Chief Baron*. The case of *Kensington* and *White*, which has been alluded to, was certainly under very different circumstances from those of the present. In that case, although four actions had been tried, and verdicts given for the plain-

(*b*) 1 Vern. 175.

tiffs

tiffs at law, there were very many other underwriters against whom actions were pending, that had not then been tried, and it seemed altogether to be a strong case for interfering to suspend the proceedings; for *White*, who was a mere man of straw, and not to be found any where, though said to be somewhere in *America*, could not be made to put in a sufficient answer till after many years. There had been no consolidation of those actions, and a great many yet remained to be tried; so that that was, in effect, an injunction, restraining proceedings in any future actions, until ulterior evidence could be got in, rather than against those which had already been tried. *White* was, in fact, the sole defendant, too, in that case.

Now, here, the question is, Whether we shall grant an injunction, after trial and verdict obtained, without any such qualifying circumstances, till the answer of one of three defendants come in? At the time the cause was tried, *Prehn* was abroad, and then an injunction, for want of his answer, might have been obtained. The great ground of defence to the action at law, was, the fraudulent insurance, the assured having had knowledge of the loss at the time; and the property not being in *Prehn*, the person in whom it was averred to be, but in the other defendants. *Richard Thornton*, being examined on the trial, proved the property to be in *Prehn*. Afterwards, a new trial was granted, on an affidavit made by *Beardmore*, that *Thornton*, the witness, had, in conversation, acknowledged

1816.

WHITMORE and others v. THORNTON and others.

knowledged to him that the property was not in *Prehn*. But that circumstance can have no weight with us in disposing of the present motion. Had this motion been made before the trial, we should have granted it on a common affidavit. At this time it is infinitely too late, and it would be contrary to proper practice to restrain the defendants.

It was strongly put in argument, that if this were practicable, there might be as many injunctions and trials, as defendants in equity. For the sake therefore of the rules of practice, which is of infinitely more consequence than this question of property, large as the amount is to the parties, we must discharge this order for the injunction which has been obtained by the plaintiffs.

GRAHAM, *Baron*, of the same opinion. In the case of *Kensington* v. *White*, there were other defendants at law, who had not tried their causes, and might have had an equity, from which the verdicts that had been obtained should not have precluded them. There should be much stronger ground laid for the interference of the Court after a verdict, than are brought before us here.

[His Lordship stated the circumstances of the case, observing, that the plaintiff was apprized long ago of all the facts on which this application rests, and might have applied in time to have had the injunction as a matter of course.]

The

1816.

WHITMORE and others v. THORNTON and others.

The plaintiffs, however, chose to go to trial, and they must now abide by the decision of the Court of Common Pleas. It was indiscreet in them to do so certainly, but by that they have precluded themselves from the available defence which they might have, for it is not the province of courts of equity to remedy the consequences of suitors having acted indiscreetly, or to take from courts of law all jurisdiction.

I think the order for the injunction should be discharged, and of course the rest of the motion is out of the question.

WOOD, *Baron*, absent.

RICHARDS, *Baron*. I am perfectly satisfied with the opinions which have been already given—[*his Lordship stated the circumstances of the case.*]—In former times, courts of equity exercised a jurisdiction over common law trials, which they do not do now. In the equity cases abridged, there are several instances of the exercise of such an interference to be found, under the head 'Injunction' *(b)*; but that practice has long ago been put an end to, and at present there is no such jurisdiction exercised.

Such applications as these are properly made to courts of equity, as auxiliary to courts of law on trials between parties, by means of bills for discovering, and commissions to examine absent witnesses;

(c) Injunction, p. 524.

but

1816.

WHITMORE and others v. THORNTON and others.

but their object is merely to give the party assistance at the trial of an action. It must therefore necessarily follow, that where there is no trial to be had, there can be no discovery to be sought. If a verdict had passed *simpliciter*, without more, a bill then filed for a discovery might have been demurred to, for there could be no discovery there, any more than as to a matter not at issue; so, also, an application for an injunction would have been refused on the same principle. And I do not see that there being a rule pending, for shewing cause why there should not be a new trial, can make any difference.

In this case the bill is filed, after trial and verdict, for the plaintiff at law; but the defendant could not demur here, because that does not appear on the record, and therefore it is that he comes to the Court to apply for a discharge of the injunction which has been obtained.

The only distinguishing circumstance in this case is, that there is at this moment a rule to show cause pending, why a new trial should not be granted.—Now let us suppose that that rule should be discharged, then we should be doing what would be nugatory. Are we to order a conditional injunction, in case that rule should be made absolute, with the alternative that it shall stand dissolved, if the rule should be discharged? It is impossible that there should be any such practice in this Court. The only case cited to show that it may be done, is that of *Kensington* v. *White*; but that was a very different

different case. The trial which had been had there ought not to have precluded the other defendants who had not lost a trial. That, therefore, comes to the common case of an application before trial; but if that case were wrongly decided, is that any reason why we should do wrong again? And certainly it would be extreme injustice to refuse the present application to get rid of the order which has been obtained for an injunction.—As to the object of delay, which has been adverted to, that is notoriously often the only motive for applications for injunctions under these circumstances.

Order for the Injunction discharged.

IN THE EXCHEQUER CHAMBER.

(IN ERROR.)

1816.

Wednesday, 27th November.

13th November.

DORAN *v.* O'REILLY and others.

In an action of debt on a foreign judgment, for an entire sum recovered on counts for the balance of a merchant's account, for goods sold—monies advanced and paid—monies due on bills of exchange—and for interest: this Court will not give interest on affirmance of the judgment of the Court below.

Where interest is given, the debt must *appear on the record* to be one which carries interest.

The Court will not act on facts stated to them by affidavit, because the other party can have no opportunity of contradicting them.

LITTLEDALE moved for interest, in the event of the affirmance of this judgment in the Court of King's Bench. It was an action of debt brought on a judgment in the Supreme Court of Judicature in *Jamaica*, in which the defendant, the plaintiff in error, had suffered judgment by default.

It appeared, from the affidavit read in support of the application,—that in the amount of the damages which had been recovered in the cause in the King's Bench, interest was calculated, included and allowed:—that the declaration in that cause consisted of two several counts on the *Jamaica* judgment, and other counts in debt, including a count for interest; (but the cause of action, in the *Jamaica* Court, not appearing on that affidavit, the motion stood over that that might be ascertained;) and now it was moved on a supplemental affidavit, stating that that judgment had been recovered by the defendants in error, in an action for the balance of a merchant's account for goods sold, monies advanced and paid,

monies

1816.

DORAN v. O'REILLY and others.

monies due upon bills of exchange, and for interest: —that the amount of the cash-payments or advances, and monies so due on bills of exchange, forming part of the debtor's side of the said account, exceeded the sum recovered by the *Jamaica* judgment, and that it was the usual course of dealing in general, as well as between these parties, to charge and allow interest upon such accounts.

It was submitted, that the defendants (in error) were entitled to interest on the special counts, and to those the application was confined; —that the affidavits showed that the sum recovered in the *Jamaica* Court was on demands which carried interest by the course of dealing there, and that where that was so the cases authorized an application for interest to this Court; —that the judgment recovered in *Jamaica* had consolidated all the demands in one entire sum, and in an action brought on that judgment there, the Court would have given interest.

[GIBBS, *Chief Justice.* I am not prepared to admit that we are bound to adopt the practice of the Courts of *Jamaica*.]

It was also urged, that interest had been given in this Court on a judgment, the subject-matter of which did not carry interest; and he produced a case, furnished by the clerk of the errors, of interest having been allowed on the balance of a merchant's account.

GIBBS, *Chief Justice.* We should not be warranted

1816.

DORAN v. O'REILLY and others.

ranted in granting this application. In those cases where we give interest on judgments affirmed, it always appears on the face of the record, that the demand of the plaintiff below is of a debt which bears interest of course, as in the case of a bill of exchange, or promissory note. The first count of the declaration in the foreign Court is for goods sold. On that demand no interest could be due, and therefore none ought to be recovered.

Besides, we are called on to do this on facts stated in an affidavit, which would be a mischievous precedent. All those facts might be false, and if they should be so, the party who is to be fixed with them can have no opportunity of contradicting them.

BURROUGH, *Justice*. Interest is never recoverable on counts for money paid, and money had and received without a special contract. That has been decided on solemn argument.

GRAHAM, *Baron*. Had the plaintiff below brought *assumpsit*, he might have recovered interest in the shape of damages.

Motion refused.

WOOD, *Baron*, absent.

1816.

Wednesday, 27th November.

ANONYMOUS.

LITTLEDALE moved for interest on the affirmance of a judgment of the Court below, on an affidavit of service of the notice of motion, the substance of which was,—that the deponent had attempted to effect the service on the plaintiff in error, at the house where he *had* lodged;—that he was informed by the occupier of the house that the plaintiff had gone abroad, and that she was authorised by him to receive whatever letters or papers might be brought there for him,—and that the deponent left the notice with her.

But the Court said, that the service was insufficient, and refused the motion.

Service of notice of motion for interest on affirmance of a judgment of the Court below, by leaving it with the occupier of the house where the plaintiff in Error *had* lodged, and who informed the person calling for that purpose, that the plaintiff in Error was abroad, but that she was authorised to receive all papers for him, is insufficient.

1816.

Wednesday, 27th November.

STRATTON *v.* HILL.

THE plaintiff declared in debt for 2,450*l.* rent arrear, and on a bill of exchange: "For that the defendant on, &c. at, &c. according to the usage and custom of merchants from time immemorial, used and approved within this kingdom, *made* his certain bill of exchange in writing, bearing date, &c. and then and there directed the said bill of exchange to

Debt lies against the *indorser* of a bill of exchange, drawn by *him* and made *payable to his order*.

Indorsement by the drawer does not give him a new character as *indorser*, or divest him of any liability to which as *maker* of the bill he would have been subject.

1816.

STRATTON v. HILL.

the drawers, by which said bill of exchange the said defendant then and there requested the said drawers, two months after the date thereof, to pay to his *the said defendant's own order*, the sum of 500 *l.* value received, which said bill, said drawers afterwards, to wit, &c. upon sight thereof accepted, according to the said usage and custom of merchants; and the said defendant, to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on, &c. at, &c. according to the said usage, &c. *indorsed* the said bill of exchange, and thereby then and there ordered and appointed the said sum of money, in the said bill of exchange specified, to be paid to the said plaintiff."—Averment of due presentment, non-payment and notice,—whereby, &c. *actio accrevit.*—There was a similar count on the same bill of exchange, with an averment that the drawees, (having accepted,) were not to be found at the place at which the bill had been addressed to them.

The plaintiff having recovered a verdict, (which was entered on the *postea* generally.)

[12th November] *Merewether* now moved an arrest of judgment on the counts on the bill of exchange, on the following authorities:—1 Mod. Entr. 312, where it was said, that an action of debt would not lie against the indorser;—*Welsh* v. *Craig* (*a*), where it was held, that debt did not lie on a promissory note, nor,

(*a*) 8 Mod. 373.—1 Strange, 680. S. C.

indebitatus

indebitatus assumpsit, on a bill of exchange; and an anonymous case, in Hard. 487, in which the Court said, that the custom of traders did not extend so far as to create a *debt*.

Thurston, *W. E.* and *Chitty*, now showed cause; submitting, that as the defendant was maker of the bill of exchange as well as indorser, his indorsement was necessary to give it currency, because it was made payable to his own order. But that circumstance (they contended) did not alter his original character of principal debtor, nor discharge him from his liability as drawer. His responsibility as the original debtor never ceases. The authority of the cases cited on obtaining this rule, (in Modern Reports and *Strange*,) are much shaken by what fell from Lord *Eldon*, in the case of *Bishop* v. *Young* (*b*), who says, that in those reports of that case the proposition is merely laid down, and that *generally*; for it is not made to appear either *by* whom the action was brought, whether payee or indorsee, or *against* whom, whether maker or indorser. But his Lordship in that case furnishes the true criterion for deciding the question then before him,—which was, whether debt might be maintained against the *maker* of a promissory note,—by stating the sole question to be, Who owes the *debt*? The same criterion will serve us here, and the answer must be in this case, the drawer of the bill. Another conclusive inquiry is, for whose benefit has the apparent consideration enured?—Clearly for the drawer's; and that is the reason given in the case of *Hodges* v.

(*b*) 2 B. & P. 78.

1816.

STRATTON v. HILL.

Steward (b), where the Court allowed, that debt would lie against the *drawer* of a bill of exchange for value received. Unless therefore the fact of the defendant's having indorsed the bill, divest him of his liability as the original, and ultimately responsible debtor,—between whom and every person becoming possessed of the bill there is a continuing privity,—the present form of action is right, and the plaintiff is entitled to the judgment that he has recovered.

Merewether, in support of the rule, admitted that the question was, whether the plaintiff was liable in the present form of action, as drawer of the bill of exchange payable to his own order, after having acquired the new character of indorser; and whether debt might be maintained against an indorser, who was also drawer of a bill, as, between an indorser and payee there is no such privity of contract as will sustain debt. In the case of *Bishop* v. *Young* there are several distinctions from the present: the action was brought by the payee against the drawer, not of a bill of exchange, but of a *promissory note*, which is the case of a special contract and immediate privity, and the note was not indorsed.

Per Curiam,

The question in this case appears to us to be quite clear. The subsequent indorsement, by the actual drawer of the bill of exchange, does not render him the less amenable on that account to any liability to which he was originally subject.

Rule discharged, with costs.

(b) Skin. 346.

1816.

Wednesday, 27th *November*.

DITCHETT and another *v.* TOLLETT.

LITTLEDALE showed cause against this rule *nisi*, that, upon payment of costs, all proceedings in the actions brought on the bail-bond assigned, should not be stayed.

Proceedings against bail below will be stayed on motion (on payment of costs) where the plaintiff in the original action has been neglectful in proceeding against them on the bond as early as he might have done, even *where a trial has been lost*, if there has been reason, on the part of the bail, to think that the plaintiff did not mean to proceed in the action; such as the bankruptcy of the defendant.

But the bail-bond will be ordered to stand as a security, if the bail have not applied to stay the proceedings on the earliest opportunity.

An affidavit, made after a rule to show cause granted, is not admissible.

The rule was obtained on an affidavit made by the defendant's attorney,—that on the 25th *March* a commission of bankrupt issued against the defendant, under which he was duly declared a bankrupt,—that the writ on which the defendant was arrested, issued on the 1st of *April*, returnable in fifteen days of *Easter* (1st *May*);—that bail was given to the Sheriff;—that on the 2d *July* (*Trinity* Term ended the 3d) the plaintiffs, as assignees of the Sheriff of *Devon*, issued a writ against the defendant and his bail, returnable on the morrow of *All Souls*. On the 10th of *July* the bail below put in bail above, before a Baron, and delivered the bail-piece to defendant's clerk in Court, who returned it, with a communication that process had been issued on the bond. On the 12th, deponent served him with a summons to stay proceedings in the action on the bond assigned; that finding bail had been served in the present Term, with notice of declaration, deponent gave notice, on the 14th *November*, that the bail would, on *Wednesday* then next, justify by affidavit in open Court, which they did); and that plaintiff might

1816.

DITCHETT and another v. TOLLETT.

have taken an assignment of the bail bond on the 10th of *May*, and have issued process thereon for want of bail being put in in due time, and believes that if he had done so, the bail below would have put in and perfected bail above, and applied to stay the proceedings on such bond.

It was stated, that the reason why bail above was not put in and perfected in time was, that it was thought that as the defendant had been declared bankrupt, the plaintiff would not proceed in the action, and therefore no steps had been taken till the bail were served with process on the bond assigned, on the 2d of *July*.

In answer to this, it was now urged that the bail had not used such diligence as they ought to have used in perfecting bail above, when, perhaps, they might have obtained an order to stay proceedings, on payment of costs; but, without first justifying, they could not have obtained such an order.—That the summons which had been taken out for staying the proceedings against them, was not followed up by attending a Baron, *so that they had also been guilty of laches.*—And if it should be said that the bail were not bound to justify before application for such order, because they were the same bail as had been given to the Sheriff, yet, the plaintiff having lost a trial here, the defendant is not entitled to the order sought, without an affidavit of merits in the original action, and submitting that the bail-bond should stand as a security.

If

If it should be argued that the plaintiff, not having filed a declaration *de bene esse*, has not been delayed; the answer is, that it has been determined that a plaintiff is not bound to declare within the time limited for putting in bail *(a)*, and after that time he cannot declare till after bail are actually put in.

The original action is on a bill of exchange, the plaintiffs residing in *Bristol*, the defendants in *Devonshire*; and whether the *venue* were laid in *London* or in the country, the plaintiffs might have gone to trial, and have obtained a judgment of *Trinity* Term, so that they have lost a trial.—For these reasons it was submitted, that the proceedings should not be stayed, or at least that it must be on terms of paying the costs, and letting the bail-bond stand as a security.

[An affidavit, sworn and filed since the rule obtained, was not allowed to be read.]

Dauncey, and *M'Mahon*, in support of the rule, contended, that if the plaintiff had lost a trial, it was his own fault; that he had, by his delaying himself to proceed in the first instance, (by not having put the bond in suit as early as he might have done, which is ruled in *Hutchinson* v. *Hardcastle (b)*, to

(a) Tidd, 292. Carmichael v. Chandler. Tr. 24 *Geo.* III. Impey, K. B. 208. Prac. Reg. 71. Merryman v. Carter. Strange, 1262.

(b) Barnes, 103.

1816.

DITCHETT and another v. TOLLETT.

be incumbent on him to do,) lulled the bail into security, by giving them reason to believe that he had abandoned the action, (and there was the more reason in this case that the plaintiff should consider the suit abandoned, because the defendant had become bankrupt;)—that the plaintiff had, therefore, by his own laches, forfeited his right to proceed against the bail*,—and they submitted, that the bail below could not have applied to stay proceedings, till bail above had been perfected, which was not done till the 20th of *November*.

The Court said that there had been laches on both sides, and, in consequence of the plaintiff's neglect in not proceeding with more regularity, they would, even at this time, stay the proceedings; but as the original delay had begun on the part of the bail below, and as they had not subsequently used as much diligence as they might, they would order the bail-bond to stand as a security, and that they should pay the costs: And, on those terms, they made the

Rule absolute.

* Heath v. Astley. Barnes, 61.—Davenport v. Wall. Ib. 62.—Ward v. Alderton. Ib. 84.—Pigott, v. Truste. 3 B. & P. 222.

1816.

28th November.

The KING *v.* STANCHER.

A defendant having been committed prison on a forfeited recognizance, whereby his wife and family are become burthensome to the parish, is not a sufficient ground for the discharge of the defendant from such recognizance.

BARBER moved the Court for the discharge of the defendant from his recognizances, (which he had entered into for the appearance of one *Cartwright*, to two indictments, one for perjury, and the other for compounding felony,) and which had been estreated. The defendant had been apprehended, on the forfeiture of the recognizances, and committed to prison, in *August* 1815, whereby his wife and six children had become burthensome to the parish. The motion was made on behalf, as well of the parish, as of the defendant; but

The Court refused the Motion.

1816.

Wednesday, 30th November.

JONES and others *v.* RIPLEY.

An indorsee of the same bill of exchange on which the principal had been arrested, and another person who had justified as bail in other actions, neither of whom had sworn in the affidavit of justification, (which was in the common form, that he was worth double the sum sworn to, over and above the aggregate of *all the* other sums,) were rejected as bail for the defendant.

Time being asked, the Court granted it, to put in *other* bail, but would not allow the defendant merely to amend the affidavit, or to offer again the same bail.

THE justification of the defendant's bail (by the usual affidavit) was opposed, on an affidavit, stating that the action was brought against the defendant as indorser of a bill of exchange; and that another action had been brought against *Ann Pugh*, as

indorser

1816.

JONES and others v. RIPLEY.

indorser of the same bill; and that she and *Caleb Smith* (the other bail) were also bail in other actions in the King's Bench for large sums.—And it was now objected, that the bail should have sworn themselves to be worth double the sum which was the cause of action, over and above all their just debts *and the sums for which they had justified in the other Court*; and as to *Ann Pugh* (if she, being liable on the same bill, were admissible at all) that she should also have included, in her affidavit, the amount of the bill.

Owen submitted, that according to the practice of the Court of King's Bench, it was sufficient that the bail swore merely that they were worth double the amount of the debt, over and above their just debts, that Court considering other actions bailed, as included under the word *debts (a)*.

But the Court ruled that that was not the practice of *this Court*, and said, that had the bail justified in open Court, they must have sworn themselves to be worth double the sum sworn to, over and above their just debts, and all the other sums, and that they might have examined on that point.

Owen then applied for time; and

The Court gave till the following *Tuesday*, but with an express understanding, that they should

(a) Tidd. Pr. 258, 5th ed.

not

not be allowed to amend the present affidavit, but to add other bail, and put the plaintiff in as good a situation as he would have been in, if the bail had now justified.

1816.

JONES and others v. RIPLEY.

Rejected.

STONEHAM *v.* PINK.

1816.

22d November.

THE Court rejected the bail in this case, on an affidavit that one of them was clerk to an attorney.

One of bail, being sworn to be clerk to an attorney, rejected.

NICHOLSON and another *v.* BOWNASS and HALL.

1816.

Thursday, 28th November.

LITTLEDALE had, on a former day (16th *November*) moved for a *distringas* against the defendant *Bownass*, for not appearing to a writ of *venire facias (ad resp.)* sued out for recovering a partnership debt, on an affidavit of service (as to *Bownass*), by delivering a copy of the writ to *James Rickarby*, and showing him the original, at the dwelling-house occupied by him *(Rickarby)* as tenant to the said *J. Bownass*, and which deponent believed to have been his *(Bownass's)* last place of residence previous to his going abroad, after three several attendances at such dwelling-

Where a defendant is abroad, a plaintiff may still (since the 51st *Geo.* III. ch. 124) issue a *distringas* on service of the *venire facias*, for the purpose of *compelling his appearance* thereby, as he might have done before that act; but not for the purpose of enabling the plaintiff to enter an appearance for him, so that he may proceed thereon to final judgment as if the defendant himself had appeared.

house,

1816.

NICHOLSON and another v. BOWNASS & HALL.

house, and also at the counting-house of them the said *Bownass* and *Hall*: with the usual allegations.

On that occasion, the Court entertaining great doubt whether, *since the Act of the 51st Geo. III. ch. 124**, they could order a *distringas*, as according to

* Whereby it is enacted, "That in all cases where the plaintiff or plaintiffs shall proceed by original or other writ and summons, or attachment thereupon, in any action against any person or persons not having privilege of Parliament, no writ of *distringas* shall issue for default of appearance; but the defendant or defendants shall be served personally with the summons or attachment: at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service, to the effect following:—

"*C. D.* [*naming the defendant*] You are served with this process at the suit of *A. B.* [*naming the plaintiff or plaintiffs*] to the intent that you may appear, by your attorney, in His Majesty's Court of at *Westminster*, at the return hereof, being the day of in order to your defence in this action.—And take notice, that in default of your appearance, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney."

"But in case it shall be made appear to the satisfaction of the Court, or, in the vacation, of any judge of the Court, from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant or defendants; that then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the Court, or order of such judge as aforesaid, to sue out a writ of *distringas*, to compel the appearance of such defendant or defendants; and that at the time of the

to the ancient practice, without *personal service* of the summons, in cases of defendants not having privilege of Parliament, ordered the matter to stand over;

the execution of such writ of *distringas*, there shall be served on the defendant or defendants, by the officer executing such writ, if he, she, or they can be met with; and if he, she, or they cannot then be met with, there shall be left at his, her, or their dwelling-house, or other place where such *distringas* shall be executed, a written notice in the following form:—

"In the Court of [*specifying the Court in which the suit shall be depending*] between *A. B.* plaintiff, and *C. D.* defendant, [*naming the parties.*] Take notice, that I have this day distrained upon your goods and chattels for the sum of forty shillings, in consequence of your not having appeared, by your attorney, in the said Court, at the return of a writ of returnable there on the day of and that in default of your appearing to the present writ of *distringas*, at the return thereof, being the day of the said *A. B.* will cause an appearance to be entered for you, and proceed thereon, as if you had yourself appeared by your attorney."—"*E. F.*" [*the name of the sheriff's officer.*]

"To *C. D.* the above-named defendant."

"And if such defendant or defendants shall not appear at the return of such original or other writ, or of such *distringas*, as the case may be, or within eight days after the return thereof; in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper Court, of the personal service of such summons or attachment, and notice written on the foot thereof as aforesaid, or of the due execution of such *distringas*, and of the service of such notice as is hereby directed on the execution of such *distringas*, as the case may be, to enter a common appearance for the defendant or defendants, and

to

1816.

NICHOLSON and another v. BOWNASS & HALL.

over; and now, on the motion being mentioned again, they said, that on considering the Act, they were of opinion that the statute had not made any other alteration in the old practice, than that a plaintiff should not be permitted to use the proceeding of *distringas* as a preliminary step to entering an appearance for a defendant abroad, and then carrying on the suit as if he had duly appeared. With that object, therefore, they said they could not grant the process; but if it were to be used only for the purpose of compelling an appearance, by distraining on him till he should appear, they saw no reason why the *distringas* should not be issued in the usual course. They also said, that service of the *venire*, for the purpose of obtaining such *distringas*, ought to be in all such cases by leaving it at the defendant's actual dwelling-house or usual place of abode; but that, if left at his counting-house only, it would be insufficient, unless given to a partner, or some accredited person there*.

to proceed thereon, as if such defendant or defendants had entered his, her, or their appearance, any law or usage to the contrary notwithstanding; and that such affidavit or affidavits may be made before any judge or commissioner of the Court, out of or into which such writ shall issue or be returnable, authorized to take affidavits in such Court, or else before the proper officer for entering common appearances in such Court, or his lawful deputy; and which affidavit is hereby directed to be filed *gratis*."

Trinity Term, 1811.

(Same Point.)

* *Dwerryhouse* v. *Graham* and others.

THIS was an action against three persons, who were partners in trade.

The writ of *venire* was served on one of them, at the counting-house of the *three*, and two other copies were also given to him

him for the other defendants as service on them. On that process, so served, the plaintiff issued a *distringas*, and levied the common issues, 40 *s.* 1816.

Littledale moved, on the behalf of the resident partner, to set aside the *distringas*, on an affidavit of the above service, and that the other two defendants were resident in *America*, and had been absent from *England* two years; contending, that such service was irregular and insufficient to warrant the *distringas*: and he obtained a rule to show cause.

Dauncey showed cause; and insisted, that the statute had made no alteration in the ancient practice of issuing *distringases* on service of the *venire*.

The Court took time to consider, and on the last day of Term they discharged the Rule *Nisi*: holding the *distringas* to have been well issued, according to the ancient practice of the Court.

THE END OF MICHAELMAS TERM.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
AND
EXCHEQUER CHAMBER.

SITTINGS AFTER MICHAELMAS TERM,
57 GEO. III.

GRAY'S-INN HALL.

The KING (in aid of LUND and another) *v.* SHERWOOD. 1816. *Saturday, 14th December.*

An inquisition returned, finding special matter, without drawing and stating some conclusion as a fact, is bad, and will be quashed on motion.

GIFFORD had obtained a rule to show cause why the inquisition, which had been returned under this Extent, (and which professed to find what

As, if it find that money arising from the effects of *A.* had been placed in the hands of *B.*, a banker, as the property of *A.*, by *C.* and *D.*, his assignees under a commission since superseded,—but that *A.* was then indebted to *B.* in a larger amount than the money so placed in his hands, which still remains owing; unless *B.* has a right to retain the same towards discharging the said debt.

Quere, whether a set-off can be pleaded against a claim enforced by Extent?

Where the inquisition has been so quashed, it is necessary to issue a new writ, the former having been returned.

1816.

The KING v. SHERWOOD.

debts, credits, specialties, and sums of money, *Sherwood*, or any person or persons to his use or in trust for him, then had in the bailiwick of the Sheriff of the county palatine of *Lancaster*,) should not be quashed for irregularity, the finding being uncertain and inconclusive, and therefore not traverseable.

The finding of the Jury was set out in the following manner:

'That the sum of 626*l.* 19*s.* 4*d.* (arising from 'the effects of the said *William Sherwood*, who 'then carried on trade under the firm of *William* '*Sherwood* and Company, of which effects the 'persons acting as assignees, as after mentioned, 'possessed themselves,) was, before the issuing of 'the said Extent, placed in the hands of *Joseph* '*Hadwen*, of *Liverpool* aforesaid, banker, under the 'title of the estate of *William Sherwood* and Com'pany, by certain persons then acting as assignees 'of the estate and effects of the said *William Sher*'*wood*, under a commission of bankrupt then in 'force against him; and that such commission, in 'consequence of an issue at the last *March* Assizes 'for the county of *Lancaster*, directed by the Right 'Honourable the Lord High Chancellor to try 'whether the said *William Sherwood* was or was 'not a bankrupt, was ordered to be superseded 'before the issuing of the said Extent; and that 'the said *William Sherwood*, under the said firm of '*William Sherwood* and Company, when the said 'money was so paid into the said bank of the said '*Joseph*

1816.

The KING v. SHERWOOD.

'*Joseph Hadwen*, was indebted to the said *Joseph* '*Hadwen* to a much larger amount than the money 'so paid in, which still remains owing, unless the 'said *Joseph Hadwen* has a right to retain the 'same sum towards discharging the said debt. 'And the said Jurors do further find, that the 'said sum of 626*l.* 19*s.* 4*d.* was so paid in be-'fore the said 24th day of *September*; and that 'the same bears an interest at 3*l.* per cent. per 'annum, unless the said *Joseph Hadwen* has a 'right to apply the same towards discharging his 'said debt. And they also find, that on the said '24th day of *September* there was, and still is, a 'debt of 245*l.* 15*s.* owing by *John Neal*, of '*Liverpool* aforesaid, ship-chandler, for a quantity 'of soap, part of the effects of the said *William* '*Sherwood*, sold and delivered under the authority 'of the said persons, so acting as assignees as afore-'said; which said money and debt the said sheriff 'hath seized and taken into His Majesty's hands. 'And the said Jurors further find, that the said '*William Sherwood* hath not any other goods or 'chattels, debts, credits, specialties, or sums of 'money, or any lands or tenements, in my baili-'wick, to the knowledge of the said Jurors, which 'can be extended, appraised, or seized, into His 'Majesty's hands.'

It was also pressed, that the inquisition had furnished, on its own showing, facts which would support a plea of set-off.

1816.

The KING v. SHERWOOD.

Dauncey, and *Whetherell*, showed cause; submitting, that there was sufficient ground stated in the return, to show that the money in the hands of *Hadwen* was the money of *Sherwood*;—and that his assignees might have maintained trover for it on the facts stated;—that there was no regular form in practice for returning the finding of a debt, and no reason why it should not be specially found, leaving the question of law to be determined by the Court; nor could there be any stronger objection to this, than to the common return, of the lands of a bankrupt being seized, but that they were subject to a mortgage;—and, that the facts stated in the inquisition were distinctly put, and might, if material, be traversed. In *Monk*'s case *(a)* the Court were of opinion, that money of *Monk*'s, which had been paid into Court to abide the determination of a question, might be found, on a writ to inquire what goods and chattels he had; because, they said, that the money being but as a *depositum* there, it might be found, and that the Court did not protect it from the inquisition. Here the money is expressly found to have arisen from the effects of *Sherwood*, and as such to have been paid into *Hadwen*'s bank, and that the same still remained due and owing to him, *unless Hadwen* had a right to retain it; and whether he had or not, therefore, the money is found to be the property of *Sherwood*.

As to the claim of a right of set-off, there can

(a) 1 Ventr. 221.

be

be no such plea against the Crown, as is decided by the case of *The King* v. *Copeland (b)*.

Gifford, in support of the rule, contended, that the sheriff had no right to find special matters thus, and then to raise questions of law on them, which prevented his returning the simple fact;—that on the face of this inquisition, there was nothing definitively returned on which an issue could be taken, or which, if tried, would decide the case, but a *venire de novo* must be awarded, so that the finding would be altogether nugatory. It is not found, as a fact, that the money is due and owing to *Sherwood*, nor to whom else; and, in truth, it was the property of the assignees, nor could *Sherwood* maintain any action for it, till some assent should be given to the conversion of the property. And what defence could *Hadwen* set up against the assignees? he is to account with them, not with the bankrupt; or is he to be liable to two actions? *Sherwood* might maintain trover against the assignees.

As to the question of set-off against the Crown's debtor, it was insisted, that notwithstanding the intimation in the case of *The King* v. *Copeland*, there could be no doubt of the result of its discussion on demurrer; for it would be monstrous if the Crown's debtor should be entitled to evade the plea of set-off, by seizing his debtor's property for a debt of 1,000*l.*, when he at the same time owed him as

(b) Hughes' Rep. 204.

1816.

The KING v. SHERWOOD.

large, or nearly as large a sum: but there are many such pleas to be found on the records of the Court. At present, however, it is enough to show that the inquisition ought not to stand as returned. There is no single point in it on which issue can be taken with effect, and the defendant is not permitted to plead double; and therefore the question of the right of set-off can not be raised. The inquisition, therefore, is uncertain, argumentative, and inconclusive, and cannot be effectually traversed.

Dauncey replied.

THOMSON, *Chief Baron.* It is not at present necessary for us to decide the question of *Hadwen*'s right of set-off. The objection now made arises on the finding of the inquisition; and it is, that no fact is found with sufficient certainty to admit of an issue being taken on it by traverse; and I certainly think that it is argumentative throughout, and states that which is rather the evidence from which the Jury should have drawn a conclusion. The distinction is minute; but I give no opinion on what the finding ought to have been, whether as a debt, or money of *Sherwood*'s in *Hadwen*'s hands: but it should have been found in terms so that it might have been traversed. The objection taken is short, and, I fear, plain. Nothing is found charging a debt, so that it may be denied. The question of the plea of set-off can only arise on a proper finding; but this inquisition is argumentative and inconclusive, stating evidence without any conclusion, and there must be a better finding returned.

GRAHAM,

1816.

The KING v. SHERWOOD.

GRAHAM, *Baron.* This inquisition is argumentative from beginning to end, whereas it ought to state distinct facts. A doubt arises *in limine*, as to its being *Sherwood*'s money. It might have been paid in on a different account by the assignees, and this commission might have been superseded merely to question their conduct; and if they had acted wrong, no doubt large damages might have been recovered against them in an action of trespass. This is finding merely a sort of special verdict; and instead of furnishing us with any fact, the sheriff refers a question of law to us.

The question of set-off is certainly one of much nicety, and I confess myself much struck with the cases that appear to have had the sanction of the Court, which rule that debts seized by the Crown process are still subject to all legal and equitable consequences; and this Court may and does often correct its practice, as on the question of seizure of partnership effects, which, when the point came gravely before the Court, were held to be subject to all equities: *a pari ratione*, I should hardly think that on an Extent in aid the Crown can be in a better situation than the Crown's debtor himself would have been. I only say thus much as intimating an opinion, that the question of right of set-off is at least a grave and important question, whenever it shall fairly arise.

At present it is enough to say, that this inquisition cannot be traversed; for there is nothing found which can enable *Hadwen* to put his claim on

1816.

The KING v. SHERWOOD.

the record. It does not dispute his claim, nor does it find the money to be the property of *Sherwood*, against whom alone any right to set off his debt can arise. This finding, therefore, is altogether nugatory.

WOOD, *Baron.* As to the question, whether a set-off might be pleaded or not, under the circumstances of this case, I give no opinion; but I think that in point of form, the finding which has been returned on this inquisition fails in two points: first, the title of the Crown is not made to appear; secondly, it is not found (as it ought to be, and that precisely) that the money which has been seized was the property of the defendant. In fact there is nothing found. The only statement is, that *Sherwood* had become bankrupt, and that his assignees had paid so much money into *Hadwen*'s hands. On that commission being superseded, *Sherwood* might have brought an action of trover or trespass against the assignees. In trover he might have recovered the money; and in trespass, much more than the amount: and surely, if large damages should be given against the assignees in an action of trespass, nothing could be more unjust than to take this money out of their hands, and leave them still liable to pay those damages.

The sheriff has no right to return this sort of special verdict in the first instance. They might not have had all the facts before them on this inquisition, as they would have on a trial; but still, they had enough to draw some conclusion, and to have found

found something precisely, which might become the subject of further investigation thereafter. If this inquisition had found the money to have been the property of *Sherwood*, that might have been traversed, and certainly something should be so found, as that on a traverse, the whole case might be decided. If it had found the money to be *Sherwood's* precisely, and that some one else claimed it, it might have been sufficient, and then the question of the right of set-off might have been brought forward; but on this finding there is nothing conclusive. It fails on both points, and is therefore bad.

RICHARDS, *Baron*, of the same opinion.

Rule absolute.*

A question then arose on the practice, Whether a new writ would now be necessary? and

The Court held, that as the old writ had been returned, a new one must be issued.

* *Vide Westcott's* case, 13 Co. 72,—where, on a finding by writ of *diem clausit extremum*, that a moiety of a manor was holden, &c. *as it appeareth* by a certain exemplification, &c. a *melius inquirendum* was awarded, because the verdict of the jury (with a *prout patet*) was not full and direct, so as to give the party grieved a remedy by traverse.

The

1816.
Saturday, 14th December.

The KING (in aid of LAMB) *v.* THOMPSON and another, (Executors, &c.)

The Court will set aside a writ of *scire facias*, issued on an Extent, if the warrant for the commission to find debts have not been signed by a Baron, no application having been made for such signature.

HULLOCK, Serjeant, having in the preceding Term obtained a rule to show cause why the writ of *scire facias*, which had been issued against these defendants, tested of the same Term, should not be set aside;—on that application, two objections were made to the validity of the proceedings:—that the debt had not been found, by inquisition, in the life-time of the deceased;—and that the warrant, for the commission to find debts, had not been indorsed by a Baron, nor the warrant for the Extent, on which the writ of *scire facias* was founded: but the judgment of the Court was given on the latter point only.

Dauncey, and *Walton*, now showed cause. As to the objection of the warrants not having been indorsed, they said, that that was always considered a mere formality, and that they were all indorsed together when the inquisition came back, and it might be done at any time.

Hullock, Serjeant, in support of the rule, submitted, that however that might be, it had not been done in the present instance; and therefore pressed the objection.

THOMSON, *Chief Baron*. The objection is,—the want of a Baron's signature to authorize these proceedings.

1816.

The KING v. THOMPSON and another.

ceedings. The commission issues under the seal of the Court, but the warrant should nevertheless be indorsed. To give validity to an Extent in aid, there must be a Baron's *fiat* previously obtained, though none is necessary on issuing a *scire facias*: and certainly, where a Baron's signature is necessary to give effect to that which is to be the foundation of subsequent proceedings, the want of it must render them invalid. This is not the case of an accidental omission on the part of the Baron applied to, or like it; it is, in fact, a proceeding without any, or rather, on their own authority. It does not appear that any Baron was even applied to, to sign the warrant;—and who shall now do it? The omission cannot be got over.

GRAHAM, *Baron*, of the same opinion.

WOOD, *Baron*. This is certainly an irregularity. Had it been an omission of mine, it would have been another thing, but no application was ever made to me. I was applied to for my *fiat*, for an Extent in aid, which I refused; but on no other occasion. If we were to suffer this sort of proceeding, the consequence would be, that commissions to find debts might in all cases be sued out, without going before a Baron.

Per Curiam.

Rule absolute.

The

1816.

Wednesday, 18th December.

The KING *v.* COLLINGRIDGE.

The sheriff is entitled to levy costs, under 43d *Geo.* III. ch. 99, on an Extent against a collector of taxes: and the sheriff's poundage is included in the word charges, and may be levied; and it is payble where the money is paid in, before a *venditioni exponas* has issued, although that proceeding is obviated thereby.

OWEN obtained a rule, in the last Term, calling on Messrs. *Booth* and *Leggatt*, (Solicitors for Taxes,) and the Sheriff of the county of *Worcester*, to show cause why the former should not refund and pay back to the defendant, the several sums of 20*l.* 6*s.* 8*d.* received by them, (being the amount of their bill of costs;) 3*l.* 3*s.* received by their agents, at *Pershore*, (as their costs on this Extent, issued by them against the defendant, for the sum of 74*l.* 13*s.* 7*d.* received by him as a collector of taxes;)—and why the said Sheriff should not refund the sums of 5*l.* 12*s.* 6*d.*—2*l.* 2*s.* and 10*s.* received by him for poundage, bailiff's fees, and keeping possession, in respect of the said writ of Extent;—and why Messrs. *Booth* and *Leggatt* should not deliver to defendant a bill of costs to be taxed, and pay the costs of this application.

But if the agent in the country, of the solicitors for taxes, have received any money from the defendant as costs under the levy, or the sheriff have taken any thing for extra costs, as bailiff's fees and keeping possession, the Court will order them to refund.

Dauncey, and *Nolan*, now showed cause. An affidavit of *Leggatt* was put in, whereby he stated himself to be ready to hand over his bill for taxation, and that he should have done so on request; and disclaimed all knowledge of the charges made in the country. But the counsel for the Crown con-

It does not seem to be necessary, under that act, that the commissioners should issue their warrant against the collector to recover the duties detained, to authorize the issuing of an Extent against him as a condition precedent; or if it be, it is rather a ground of a motion to set aside the Extent, for irregularity.

The bill of the Solicitors prosecuting the Extent for the Crown may be taxed.

tended,

1816.

The KING v. COLLINGRIDGE.

tended, that as this was the case of a collector detaining duties in his hands, it was provided by 43 *Geo.* III. ch. 99, sec. 41 *, that the same might be recovered as a debt of record, with all costs and charges attending that recovery. The defendant was liable to pay all that had been demanded of him, subject (they admitted) to the taxation of the solicitor's bill, to which no objection was made; and

* By that sect. it is enacted, "That if any collector, being duly summoned, shall refuse to attend such respective commissioners, or shall not answer all such lawful questions as shall be demanded of him by such commissioners, touching the execution of his office of collector, or shall refuse or neglect to produce to them the certificates of assessments, accounts, or vouchers of such receipts or payments as aforesaid, or shall not obey the order of such commissioners, to be made as before directed, every such collector shall forfeit and pay the sum of fifty pounds, to be charged upon him in any assessment as aforesaid, and to be recovered as such assessments may be recovered, over and above any forfeiture or disability that may be incurred by virtue of this act, for detaining monies of the said duties in his hands, contrary to this act; and whenever any money of the said duties herein mentioned shall be detained in the hands of any collector or collectors, or any penalty or penalties imposed on any collector or collectors shall remain unpaid, and the same, or any part thereof, cannot be recovered by or under the warrant or authority of the respective commissioners, or the said respective commissioners shall neglect to issue such warrants, then such part thereof as cannot be so recovered, which shall have arisen from the said duties, shall be recoverable as a debt upon record to the King's Majesty, his heirs and successors, with all costs and *charges* attending the same; and such part thereof which shall arise from any penalty as aforesaid, may be recovered by action or information, as other penalties may by this act be recovered, with full costs of suit; and the sum so recovered shall be paid to the receiver-general, in aid of the parish or place answerable for the same."

that

1816.

The KING v. COLLINGRIDGE.

that the poundage, and the other charges, were covered by the words costs and *charges*, used in the statute.

Owen, in support of the rule.—The general principle is, that the Crown neither pays or receives costs; and, to render the defendant liable to pay them in the present instance, he must be brought within the meaning of the section of the act which has been adverted to. By that section it is made necessary, for the purpose of entitling the Crown to the costs of recovering the duties, that the collector shall have been previously distrained on, by the warrant of the commissioners; but it does not appear that any such warrant was issued in this case: and it must be shown by them to have been issued, to found their claim to costs, or enable them to resist this application. The object of the act was to punish contumacy in the collector, and to aid the parish. *Non constat*, if the commissioners had issued their warrant, that the defendant would not have paid the amount, and the trifling costs which would have been incurred by that proceeding.

As to the Sheriff's claim of poundage, he contended that he was not entitled to it, under this statute; or, if he were, that as there had been no sale here, he was not entitled to it in the present case: for, by the late decision in *Graham* v. *Grill* (a), it was held that a Sheriff, who had seized property

(a) 2 M. & S. 294.

on

on a *capias utlagatum*, and taken an inquisition thereon, was not entitled to poundage, because there had been no *venditioni exponas*; for that the debt had not been *levied* in the words of the statute giving poundage, (3 *Geo.* I. ch. 15, sec. 3.)

To the extra costs (for the levy, and keeping possession,) also, he submitted, that it was clear the Sheriff was not entitled *from the defendant*; and that there was not even a pretence for the charge made by the agents in the country.

Dauncey, in reply, contended, that the Crown was entitled to recover the costs of this proceeding against the defendant, and that, *ultra* the Sheriff's poundage. And he referred the Court to a case, (of the *King* v. *Kirk*,) said to have occurred in this Court in the year 1809; which was a proceeding to compel a collector of taxes to make up a deficiency. He applied to be discharged from liability, on payment, and a rule was granted. On that rule being made absolute, it was referred to the Deputy Remembrancer, to ascertain what the Sheriff was entitled to for extra costs, beyond the poundage levied.

[THOMSON, *Chief Baron*. It does not appear, from that case, by whom it was to be paid.]

It is included in the word charges, and as the object of the Act was to save the parish, it would be defeated, unless *all* were to be paid by the defendant; for if he is not to pay all costs and charges, the

1816.

The KING v. COLLINGRIDGE.

the parish must, and there must be a re-assessment on that account.

THOMSON, *Chief Baron.* The question of poundage is one in which the sheriff is more immediately interested; and we are under some difficulty in that respect, because he is not before the Court.

It really seems to me, that by this Act the parish is to be completely exonerated from all expenses attending the recovery of the duties which have been received by the collector, and that he is bound to pay them over to the receiver-general.—[*His Lordship read the* 41*st section of the Act.*]—It was urged, that to bring the defendant within this section, it must have been shown that the commissioners had ineffectually issued their warrant, to enforce the payment of the money received for duties, and so detained by the defendant; for that otherwise the proceeding by Extent was not authorized by this statute. But if that be a condition necessarily precedent, it would rather be a ground of objection against the issuing of the Extent; and if so, this should have been a motion to set it aside for the irregularity: but it has not been so made, and therefore we must take it that this Extent is regular, and then it might, perhaps, have been open to the defendant to show, that the money would have been paid, if the commissioners had issued their warrant; but no such thing has been shown.

The next question is, whether the payment of the money by the defendant in this way, before the *venditioni*

1816.

The KING v. COLLINGRIDGE.

venditioni exponas issued, so puts an end to this proceeding, instituted in aid of the *parish*, as to leave *them* liable to the payment of the poundage and expenses; for all that *Booth* and *Leggatt* have to do with it, is their own bill. The writ was indorsed to levy poundage, and if that were improperly indorsed, it might be a reason why they should be called on to answer for that to the defendant. But it seems to me, that the poundage was properly levied in this case, as well as the other costs. The solicitors' bill has been moved to be submitted to taxation; it would have been handsomer if that had been previously required of them out of Court, but as it is brought before us, we must make the order absolute, as to that part of it, and as to refunding the money received by their agents in the country, and by the sheriff beyond his poundage; and we should discharge it as to all the rest.

GRAHAM, *Baron*. The question arising on this motion is, whether this Extent was authorized by the Act, without its being shown that the commissioners had neglected to issue their warrant previously. Now were it a question affecting the right to issue the Extent, we might, perhaps, have expected it to have been shown, that the commissioners were ready to have issued their warrant, and that the solicitors for taxes had taken the matter out of their hands. The commissioners are not expected to be lawyers, and nothing is more natural than that in cases of difficulty, they should resort to the solicitors for taxes. But, however, no objection is made to the Extent itself; then the question is, whether the

1816.

The KING v. COLLINGRIDGE.

defendant is to pay the costs and poundage. Whatever distinctions may have been made, as to the meaning of the terms costs and charges, there is no doubt that the latter word will include the sheriff's poundage; and to say that poundage is not due, where there has been no *venditioni exponas*, is absurd in the mouth of the defendant.

As to the sum taken by *Woodward* (the agent in the country,) Messrs. *Booth & Leggatt* have got rid of that, by answering—that it was charged without their authority. It is certainly an ungracious thing, thus to call on solicitors of their respectability for a taxation of their bill; but they have a right to do so, perhaps, and therefore we must order it. As to the costs, that must be reserved for further consideration, when the officer shall have made his report.

WOOD, *Baron*. The whole question depends on the words of the Act; if the summary proceeding pointed out by the statute had been adopted, there can be no doubt that the defendant would have been liable to have paid the costs of the ulterior process. It appears by the 42d section of this Act, that "the said respective commissioners, or any "two or more of them, in their respective jurisdic-"tions, are hereby authorised and empowered to "imprison the person, and seize, &c."—so that the commissioners are not obliged to proceed in the summary manner pointed out, but are merely authorised and empowered to do so; and therefore they may exercise a discretion, whether they will so proceed

or

1816.

The KING v. COLLINGRIDGE.

or not. It is in case of their neglect to do so, that the amount is recoverable as a debt of record, which gives the power to issue the Extent. Now it is clear that they have neglected, or at least refused to issue their warrant, because it has not been done, and therefore the Extent was properly issued; but if that were an objection at all, it would go to the Extent itself, and then it would have been incumbent on the party making it, as a ground for setting aside the process, to have shown by affidavit, that the issuing their warrant had not been neglected or refused by the commissioners. As to the question of poundage, although, in general, it cannot be levied by the Crown under an Extent for the recovery of simple contract debts, yet this statute has made an express provision in the case of collectors making default, for levying the arrears, and all the costs and charges attending the same; and that provision empowers the levying of the poundage. The solicitors' bill, therefore, the poundage, and other expenses, I think, have been properly charged, provided the *quantum* be correct, and as to that it must be referred to the officer.

RICHARDS, *Baron*, concurred.

1816.

Monday, Tuesday, Thursday, 16th, 17th, & 19th December.

[*Saturday 23d November.*]

The KING *v.* PEARSON and another.

THIS was a motion, on behalf of the defendants, to set aside the writ of *scire facias*, which had been issued against them on the ground of irregularity.

If an inquisition to find debts executed in vacation be returnable in the following Term, and a writ of *scire facias* be issued thereon, tested as of the Term preceding the vacation, the Court will set it aside for the repugnancy which must appear on the face of the record: nor will they allow it to be aided by inserting the true dates by means of a memorandum on the record.

On an Extent issued by the Board of Taxes, tested 2d *July* last, and returnable on the first day of the present Term, against *Bruce* and Co. bankers in *London*:—*Cooke* and Co. bankers in *Sunderland*, were found to be largely indebted to them, and local bills, to a considerable amount, in the hands of *Cooke* and Co. were seized among their other effects, under that Extent, on the 4th of *July*. On that inquisition, writs of *scire facias* were issued against the persons indebted to them on those bills, among whom were the present defendants.

The writ*, in this instance, was tested on the 3d of *July* last, (in *Trinity* Term) and the Sheriff's warrant

Where a writ of *scire facias* is moved to be set aside, as having been *irregularly issued*, (not as having been irregularly *served*,) the motion may be made, after appearance.

The Crown has not an election to proceed against its debtor either by Extent or *scire facias*, where the debtor is not insolvent.

Scire facias may issue in vacation, but only where the debt which it seeks to recover is actually due before the end of the preceding Term, or it must be tested as of the next subsequent Term.

* The writ reciting the inquisition taken on the 2d *July*, on which *Bruce* and Co. were found indebted to the Crown for money had and received by them from the Receiver General of taxes for the county of *Southampton*; and another inquisition taken the 14th *September*, whereby the present defendants,

1816.

The KING v. PEARSON and another

warrant thereon was dated 24th *September* following. It appeared, therefore, on the face of the proceedings, that the *scire facias* was issued before the return of the writ of Extent, on which it was founded; and it was objected, that that was a repugnancy manifest on the record which vitiated the whole proceeding, and was incurable. For until the return of the writ of Extent, there was nothing on which the *scire facias* could have been founded, as it was that alone which could give the Crown a right to proceed against these defendants.

dants were found indebted to *Bruce* and Co. in the sum for which the *scire facias* issued, as the drawers of a promissory note, dated 12th *March* 1816, payable on the 15th *July*; which said debt and promissory note the sheriff, on the day of taking the said inquisition, had seized into the hands of the Crown, (referring to the writ of extent and inquisition,)—required the bishop of *Durham* to command the sheriff to give notice to the defendants to appear on the 6th *November* next, to show, &c.—Tested 3d *July*.

Sheriff's Warrant thereon.

"(L. s.) *William Hutchinson*, esquire, sheriff of *Durham*, to *John Knaggs* and *John Watkins*, my bailiffs, greeting: By virtue of his present Majesty's writ, to me directed and delivered, I command you and each of you, that you shall and do forthwith summon *Joseph Pearson* and *T. Powell*, of *Sunderland*, that they be and appear before the Barons of his said Majesty's Exchequer at *Westminster*, on the 6th day of *November* next, to show cause why his said Majesty should not have execution against them for the sum of fifty-seven pounds six shillings and one penny, which it is found they are indebted to *Patrick Crawford Bruce*, *George Simson*, *Thomas Freen*, and *Harry Mackenzie*, debtors to his said Majesty; and have you there then this precept. Given at *Durham*, under the seal of my office, this 24th day of *September*, in the year of our Lord 1816."

1816.
The KING
v.
PEARSON
and another.

The *scire facias* bears date as of *Trinity* Term, yet it recites the fact of an inquisition not found till *September* following, which is, in itself, an absurdity; and might work an injustice, by depriving the party sued of the time which he would otherwise have, if the writ was not issued till it regularly might,—till after the return of the proceeding on which it was founded.

[On the part of the Crown it was objected, preliminarily, that this application to set aside the process for irregularity, came too late, as the defendants had appeared to the writ, and were therefore precluded from objecting to it on that ground.

To that it was answered, that the appearance which had been entered, if what had been done could be called an appearance, was previous to the writ itself being put on the record, for the writ had not yet been returned;—that what had been done was necessary, in order to obtain a copy of the writ, which the defendants could not have had without; for they had been served only with the Sheriff's summons, on the process which came to his hands, without having which the repugnancy could not have been discovered, or the objection made*.

The Court held the defendants not precluded by having appeared:—

THOMSON, *Chief Baron*, observing,—that this was not the case of an objection taken to the irregular *service* of a regular writ, but arising out of

* See the Summons, *ante* note, 289.

the

the service of a writ which was itself alleged to be irregularly sued out.]

Dauncey, *Nolan*, and *Parke*, now showed cause. They submitted,—that the present objection, if tenable, was merely an objection to the form, not to the substance of the proceeding;—that it was the usual course of practice to *teste* the *scire facias* as of the last day of the preceding Term, when issued in vacation;—that that was a fiction certainly, but as it did not operate, in effect. to deprive the defendant of any time which he would otherwise have had, but, on the contrary, would give him earlier notice of the debt having been found, and the process issued, whereby he would acquire more time to prepare for his defence (for it could not be proceeded on till the next term);—there was, therefore no substantial reason why the writ should be set aside on that ground.

If, on the other hand, the Court should be of opinion that the *teste* might, in any respect, prejudice the defendant, the remedy, they submitted, was obvious and easy; for a memorandum might be entered on the record, correcting the apparent inconsistency, by giving the true day on which the debt had been found, and the writ actually issued.

There is no doubt of the right to issue an *Extent* in vacation, under the same circumstances; and if so, why not the writ of *scire facias*, which is merely a summons?

1816.

The KING v. PEARSON and another.

[THOMSON, *Chief Baron.* In the case of an Extent, an affidavit of the insolvency of the debtor is made; but if that cannot be done, the *scire facias* is the only course. The Crown has not an election, except in cases of insolvency.]

The present writ would be enrolled as of *Michaelmas* Term; and so far it would be substantially correct, for the inquisition would then be regularly returned. But the *teste* is not of the essence of the writ; and it is never considered necessary, in this Court, to wait for the return of the inquisition before the writ is issued. If it were, the Crown might often lose a term, and it would operate to delay the recovery of the Crown's debts. By a calculation of the difference which it would make in point of time, in case of the writ being sued out in *Hilary* vacation, it was shown that there might be a delay of half a year caused to the Crown.)

As to the first point, of the Crown's right to sue out process in vacation, before the return of the inquisition, the Counsel for the Crown cited the case of the *King* against the estate of *Curtis (a)*, where a *diem clausit extremum* had been issued on the 25th *February*, on an inquisition taken on the 23d of the same month.

That the *teste* of the writ was not held to be conclusive, they cited the case of the Marquis of *Tweedale (b)*, where a writ, dated the 12th *June*,

(a) Parker, 95. (b) 1 Anstr. 143.

certifying

1816.

The KING v. PEARSON and another.

certifying a fact of the 14th, which was therefore contended to be a mere nullity, was held to be sufficient, and was supported notwithstanding the repugnancy. In that case it was said by *Eyre*, Chief Baron, in delivering the opinion of the Judges:—"In "all cases the *teste* is not of the essence of the "instrument; dates originally were not necessary; "they are not necessary to deeds: even in writs, "Courts of Law, though they require that they "should have a *teste*, do not require that it "should be of the real date; and the technical "*testes* of writs are often false, in fact." p. 155. And further, as to the imputed repugnancy, they cited the *Attorney General* v. *Bagg (c)*, which was thus:—Sir *James Bagg* died in *Aug.* 14 *Car.* and a *diem clausit extremum* issued, bearing date the last day of the preceding *Trinity* Term, to inquire what lands he had when he became indebted to the King; and the Court were of opinion that the Extent was well executed,—notwithstanding the writ bore *teste* before Sir *James*'s death,—and that it was a good warrant to make inquiry after his death, and according to the common course of such writs, which never bear *teste* in vacation, but from Term to Term.

In the case of *Cross* v. *Smith (d)*, it was held, that a *certiorari* well removed a plaint levied after the *teste* of the writ.

In support of the other proposition,—that the

(c) Hardr. 126. (d) 2 Raym. 838. & Salk. 148. S. C.

teste

1816.

The KING v. PEARSON and another.

teste of the writ did not conclude the defendant from averring any thing inconsistent with the truth of it,—the case of *Johnson* v. *Smith (e)*, was cited; where an averment of the true time, of the writ of *latitat* having been issued, was admitted, (notwithstanding the fictitious date of the *teste*, for the purpose of letting in a plea of the statute of limitations. And, finally, they submitted that the objection, if tenable, might be cured by amending the record, by indorsing a memorandum of the true day on which the writ issued. That was shown to have been done in the case of *Dodsworth* v. *Bowen (f)*, although there was there an equal incongruity on the face of the record,—the bill (filed against an attorney, as acceptor of a bill of exchange) appearing to have been filed in *Michaelmas* Term, whereas the cause of action did not accrue till the 13th of *December* following.

They further submitted, that this was too important a question to decide, on a motion of this sort, and that the defendants should have demurred.

RICHARDSON, in support of the rule, urged,—that there was no precedent to be found in the practice of the Court, for permitting so manifest a repugnancy and absurdity to appear on the face of the record. For as to the instance of the writ of *diem*

(e) Bun. 959,—where all the older cases on the point are brought together.

(f) 5 T. Rep. 325.

clausit

1816.

The KING v. PEARSON and another.

lausit extremum that does not state the day when the party died*.—That in *Bagg*'s case there must be some mistake in the report, as the question of the regularity of the writ, was not then, in fact, before the Court; for that case came before them on a bill, filed by the Attorney General against the heir of Sir *James Bagg*, to avoid a conveyance whereby the heir claimed the estate; and (he observed) that the Court of Exchequer also seemed to be mistaken, in considering writs of *diem clausit extremum* as always *necessarily* bearing *teste* in Term, for, in the *Registrum Brevium*, that writ is classed under the head of *Brevia originalia*, and all original writs may be tested at any time.—That this case was distinguishable from that of *Bagg*'s, in *Hardress*, because *there* there was no repugnancy apparent on the record, nor is there in cases of *certiorari*, which is said to remove a plaint

* The form of the writ, as taken from the *Registrum Brevium*, page 291, is,—"Rex escaetori suo in com' Eborum salutem. Quia I qui de nobis tenuit in capite diem clausit extremum ut accepimus; tibi præcipimus quod omnia terras & tenementa, de quibus idem I. fuit seisitus in dominico suo ut de feodo in balliva, tua die quo obiit, sine dilatione capias in manum nostram, & ea salvo custodiri facias donec aliud inde præceperimus. Et per sacramentum proborum & legalium hominum de eadem balliva tua, per quos rei veritas melius sciri poterit, diligenter inquiras, quantum terrarum & tenementorum prædictus I. tenuit de nobis in capite, tam in dominico quam in servitio in dicta balliva tua dicto die quo obiit, & quantum de aliis, & per quod servitium, & quantum terræ & tenementa illa valeant per annum in omnibus exitibus, & quo die idem I. obiit, & quis propinquior hæres ejus sit, & cujus ætatis. Et inquisitionem inde distincte & aperte factam nobis in cancellariam nostram sub sigillo tuo & sigillis eorum per quos facta fuerit sine dilatione mittas & hoc breve. T. &c.

levied

1816.

The KING v. PEARSON and another.

levied after its *teste*, because it removes all things done in Court between the *teste* and return.—That the case of the Marquis of *Tweedale*, in *Anstruther*, was in favour of his argument, because the judgment there proceeded on the ground of the *teste* not being essential in that particular writ, and the repugnancy might be reconciled by the usage of the Court; and the Court said, in the way of distinction, "This *is not* a writ in a *judicial* proceeding." Whereas here, the writ is in a judicial proceeding, and would be a nullity without the *teste*: and there is no such usage in this Court with respect to such a writ.—That the case of *Dodsworth* v. *Bowen*, where the Court had allowed a special memorandum to be put on the record, was also distinguishable from the present, because that was permitted solely for the purpose of saving the statute of limitations, and on that ground;—and that notwithstanding that case, the Court of Common Pleas had subsequently refused to sanction the filing a bill against the Warden of the Fleet in vacation, in the case of *Crook* v. *Eyles (g)*; and the same distinction applies to the case of *Johnson* v. *Smith*.

[To a question put by the *Lord Chief Baron*, it was said to be the practice, in case of the Crown debtor becoming insolvent, pending the proceeding by *scire facias*, to abandon the suit, and resort to an Extent.]

Dauncey replied.

(g) 2 Marsh, 49. 6 Taunt. 847.

THOMSON

1806.

The KING v. PEARSON and another.

THOMSON, *Chief Baron.* There can be no doubt that, as the record at present stands, there is a manifest incongruity on the face of the proceedings to which the record is to give effect. The writ of *scire facias* calls on the debtors of the original defendants, to show why execution should not issue against them for the debt. It proceeds on the ground of the inquisition having found the debt, by which it made a debt of record. That inquisition issued in vacation, and this *scire facias* is made also to issue in vacation, returnable in *Michaelmas* Term, and tested in *Trinity*. So that on the face of the proceedings, the writ appears to have issued before the demand arose on which the defendants were so sued; that is, therefore, an objection to the process, because it ought not to have been issued, for it could not then be supported, in point of fact.

It is then suggested, that an amendment may be made by a memorandum on the record, inserting the true day. But there is no instance to be found in practice, of that having ever been done in this Court. There have been instances, it seems, of such a practice in the other Courts, but those cases all receive this short answer—that it was permitted merely to prevent the loss of the debt, by the lapse of the time fixed for its recovery by the statute of limitations, and therefore a special memorandum was necessary and allowed: but that is not so here. There is no doubt that writs of *scire facias* may be issued in vacation, but the debt which it seeks to recover must be due (of record) before the *teste*; and, in the present instance, if the Crown had waited

till

1816.

The KING v. PEARSON and another.

till the return of the inquisition, it would have been quite regular: but no instance occurs of a writ of *scire facias*, founded on an inquisition, being tested before the return of the inquisition.

The question, therefore, seems to lie in a very narrow compass; and it appears to me, that this proceeding, as it stands, cannot be supported; nor do I see that any necessity exists here for altering the due course and practice of the Court, as has been proposed; and it is material, that the practice should be always correct and uniform.

GRAHAM, *Baron*. I do not consider the question of so great importance to the Crown, as has been suggested. The main point is, whether we are called on, under the circumstances of this case, to correct the apparent repugnancy of this record, affecting the right of the party called on by the writ to answer, which can only be done by a special memorandum. Now, I do not think that this a case of such moment as to authorize us, by so doing, to establish a new practice; and that want of importance, is most probably the reason why there is no precedent to be found for it. Where the Crown's debt is in danger, and that can be shown by affidavit, an Extent may be issued; and in cases where the party is in solvent circumstances, there can be no such emergency. And the whole the Crown would gain in expediting its suit, would be in general but a few days, except at one period of the year, when, it is said, (which is the result of a nice calculation) that a delay of a term would be the consequence.

1816.

The KING v. PEARSON and another.

consequence. In the present case, the *scire facias* being sued out in vacation, does not give the Crown but very little more advantage than if they had waited the 6th of *November*, when it would have been quite regular. The object of the measure, therefore, is not of sufficient importance to warrant our introducing such new practice.

WOOD, *Baron*. This is not a case in which we ought to depart from the ancient practice of the Court, which has always been, never to issue a *scire facias* till after the return of the inquisition; and that practice is founded in good reason, for the debt is not of record till then, and it is therefore consistent, both with the rule of law and the facts recited in the *scire facias*. This inquisition was not returnable till *Michaelmas* Term; and to issue the writ before that time was irregular, for there was nothing to authorize it. The extraordinary prerogative process of Extent may certainly be issued on the actual return of the inquisition, but then only on an affidavit of the insolvency of the Crown debtor, and the debt being therefore in danger. To allow that to be done which is proposed to be done, putting the true day on the record by special memorandum, might cure the defect, and thereby the Crown might be in some instances expedited, certainly; but that is not a principle of right which should induce us to permit it.—This is an attempt to put the proceeding by *scire facias* on the same footing with Extents, without there being the same necessity; for if there were, they might have had an Extent. I am not

1816.

The KING v. PEARSON and another.

not for suffering any absurdity to appear on the record.

RICHARDS, *Baron.* There is certainly an incongruity apparent on this record; and that is sought to be cured by a special memorandum. That would be an anomaly; and in the absence of precedents, I see no reason, in the present instance, for introducing a new practice: and therefore, I entirely concur in what has been already said.

Rule absolute.

1816.

Friday, 20th December.

BOWYER and another *v.* BRIGHT.

This Court will not (on a bill for specific performance) make an interlocutory order to refer a title, the validity of which is denied by the answer, and depends on facts, to the Deputy Remembrancer, until the cause is brought to a hearing, without consent.

DAUNCEY, and *Wilbraham*, moved that the defendant should pay into Court, within ten days, the sum of 1,000*l.* (the amount of a deposit, stipulated by the agreement for the purchase of an estate by the defendant, of which the plaintiffs were trustees under a settlement, for the specific performance of which they had filed their bill in this suit, to be paid by him into the hands of certain bankers at *Ludlow*,) together with 135*l.* for interest thereon, to be laid out by the Deputy Remembrancer in his name, in trust in this cause, subject to further order. *And that it might be referred to the Deputy Remembrancer, to inquire and report to the Court whether the plaintiffs could make to the defendant a good title*

1816.

BOWYER and another v. BRIGHT.

title to the premises contracted to be sold by them to him.

Owen opposed it.—He submitted, that the deposit ought to be required to be paid into the hands of the bankers, to whom it was stipulated to be paid by the agreement, which the defendant had no objection to, provided it were made productive. But the main point was, whether it should be referred to the Deputy Remembrancer to report the title; and that, he contended, could not be done on an interlocutory order, before the cause had come to a hearing.—He admitted, that by modern cases a practice had been introduced in the Court of Chancery of so referring it; but that it was done there only under very special circumstances, and where it was merely matter of law and there was no other question: and that such a practice had not yet obtained in this Court. He cited the case of *Rose* v. *Calland (a)*, where the then Lord Chancellor refused to send the case to the Master, because, he said, he would not decree the defendant to enter into a law suit; and that would be the case here, for the title would depend on material questions of fact, which could only be ascertained in the regular way. One of these was, that a third person disputed the plaintiff's right to the use of certain water which passed through his lands, without which the property would be of but little value; and that fact would be proved on the hearing.

On the other side it was pressed, that the course proposed would save the expense and delay of a

(a) 5 Ves. 188.

1816.

BOWYER and another v. BRIGHT.

commission, and could not be reasonably objected to; but

The Court said, that whatever might be the practice elsewhere, it was contrary to that which prevailed in this Court to make an interlocutory order for a reference of a title, (which was denied to be good by the answer,) to the Deputy Remembrancer, until the cause was brought to a hearing, unless by consent. The first part of the order they granted, but refused the rest; desiring that the motion might be entered as opposed.

1816.

Monday, 23d December.

The ATTORNEY GENERAL *v.* CASE and others.

The owners of a merchant vessel running foul of and damaging a King's ship lying in the *Mersey*, by misconduct of the persons on board,—held liable in an information for damages in the nature of an action on the case; although she had on board, at the time of the accident, a pilot duly licensed: because the *Liverpool* local Pilot Act is not of itself (or by reference to the 52d *Geo.* III. ch. 39.) imperative, compulsory or *penal* on the captain to take a pilot on board whilst lying at anchor, but merely subjects him to the payment of the pilot's regulated allowance on refusal.

The 30th sec. of the 52d *Geo.* III. ch. 39, (which is commonly, but improperly, called the General Pilot Act,) discharging masters and owners of vessels having pilots on board, from responsibility for damage occasioned by the neglect of the pilot;—held not to apply to vessels having on board pilots appointed for other places than those *expressly named* in the preamble or provisions of that act.

Where that act does apply, the Crown is equally bound with the subject, although not named.

THE question in this case arose out of the trial of an information in the nature of an action on the case filed against the defendants, who were owners of the ship *Columbus*, for damaging King's ships; which stated,—'That his Majesty, before and until, &c. was lawfully possessed of two ships or vessels, (and their tackle, &c.) called the *Bittern* and the *Princess*, which said ships or vessels, before and until and at the time of committing the grievance

thereinafter

1816.

ATTORNEY GENERAL v. CASE and others.

thereinafter next mentioned, were respectively lying and being in the river *Mersey*, to wit, at, &c.;— that the defendants were the owners of a certain other ship or vessel called the *Columbus*, also in the said river *Mersey*, which was then and from thence, until and at the time of committing the grievance thereinafter next mentioned, under the care, government, direction, and management of certain servants of the defendants, to wit, at *Westminster*, &c.;— that the defendants thentofore, and whilst their said ship was so under the care, &c. of their said servants, to wit, on the 8th day of *November* (1812,) by their said servants so incautiously, carelessly, negligently, inattentively, and unskilfully managed, conducted, and governed their said ship, and took so little and such bad care in the managing, conducting, and governing thereof, that the said ship of the defendants then and there, by and through the mere carelessness, negligence, inattention, and unskilfulness of the said servants of defendants, and for want of due and proper care in that behalf, drifted with the tide, and then and there with great force and violence ran foul of and struck upon and against the said ship or vessel of his Majesty called the *Bittern*, and thereby then and there caused and forced the anchors of the said ship or vessel of his Majesty, called the *Bittern*, and by and with which she was then and there lying at anchor and moored, to drag, and thereby then and there caused the said ship or vessel of his Majesty, called the *Bittern*, also to drift with the tide; and the said ship or vessel called the *Bittern*, and the ship or vessel called the *Columbus*, did thereby then and there drift together with the tide, and did thereby then and

1816.

ATTORNEY GENERAL v. CASE and others.

there, with great force and violence, run together foul of, and strike upon and against the said other ship or vessel of his Majesty called the *Princess*; by means of all which premises the said ships or vessels of his Majesty called the *Bittern* and *Princess*, and the tackle, &c. were then and there respectively greatly broken, split, fractured, damaged, spoiled and destroyed, and his Majesty was forced and obliged to lay out and spend, and did actually lay out and expend, a large sum of money, to wit, the sum of 500*l.* of like lawful money, in and about the repairing, amending, and replacing the same, to wit, at *Westminster*, &c.'

There were three other nearly similar counts.

The defendants pleaded, that the said ships with, &c. were not greatly broken, &c. and of this, &c.

The cause was tried at the sittings after *Trinity* Term 1814, before the Lord Chief Baron, when a verdict was found for the Crown, (damages 206*l.*;) with liberty for the defendants to move to enter a verdict for them, on the question as to the liability of the owners to answer for damage done by their ship whilst they had a pilot on board.

Scarlett having obtained the rule to show cause, on the ground,—that as the defendants were compellable to take a pilot on board by virtue of two several acts of parliament (the 37th *Geo.* III. ch. 78, "for the better regulation and encouragement of pilots for the conducting of ships and vessels into and out of the port of *Liverpool*," and the 52d *Geo.* III. ch. 39, (the general pilot act)

act) "for the more effectual regulation of pilots, "and of the pilotage of ships and vessels *on the* "*coast of England,*") the owners were thereby discharged from personal responsibility for any damage occasioned by their vessel while under the control of such pilot; the 30th sect. of the latter statute having expressly enacted, "that no owner or master of "any ship or vessel shall be answerable for any loss "or damage, nor shall any owner or owners of any "ship or vessel, or consignee of goods, be pre-"vented from recovering any loss or damage upon "any contract of insurance of the same, or upon "any other contract relating to any ship or vessel, "or any cargo on board the same, for or by reason "or means of any neglect, default, incompetency, or "incapacity of any pilot taken on board of any such "ship or vessel under or in pursuance of any of "the provisions of this act."

1816.

ATTORNEY GENERAL, v. CASE and others.

THOMSON, *Chief Baron*, now read his report of the evidence given on the trial, the substance of which was furnished by *M'Kenzie*, the master of the *Bittern* at the time of the accident, who proved,—That his ship was lying in the *Mersey*, and upon the 8th of *November* was moored off *Salter's Dock*: the *Princess*, too, was there, two cables length off. The *Columbus* was riding at single anchor, about three-quarters of a mile off; he had seen the *Columbus* there before the 8th of *November*; she was at anchor in the river before any accident happened; he had observed her anchor to drag one tide before on the flood; the night this happened he was in his watch, about half-past two; and he found that the *Columbus*, in a very thick fog,

1814. 8th *November*.

1816.

ATTORNEY GENERAL v. CASE and others.

was driving on the *Bittern*. There was no wind; the tide was at ebb; the *Columbus* was about the length of the ship (he supposed about a hundred feet) from the *Bittern*, when he first observed her. The quarter-master was on the deck: they hailed the *Columbus* three times, but received no answer: they carried away both their anchors. The *Columbus* and *Bittern* both struck against the other ship soon after the *Columbus* struck the *Bittern*. He went on board her immediately on perceiving the shock, and saw a man who called himself the mate: he asked him what was the reason that he did not keep a good look out: and he remarked that it was the carpenter's watch. Witness did not see the carpenter, to his knowledge: he saw four or five seamen down the aft-hatchway: they were not sober. The helm was starboard, and it ought to have been a-port; if it had, it would have avoided them. Witness saw the pilot, and told him his helm was starboard: he said it was a-port: he pointed out to him that it was starboard. They were cursing and swearing at one another: there was such a tumult they did not appear to know what they were about. The mate said he had eighty fathoms of cable out; he told him he could not have that, or the anchor would not have started off the ground: that was his judgment, and is so now. The mate said they had drunk too much, and had just come off the shore that night; if the helm had been put a-port it would have saved the running against them.

His Lordship observed, that he need not state more of the evidence, because it was extremely clear

1816.

ATTORNEY GENERAL v. CASE and others.

clear that the injury which the King's ship sustained was occasioned by the bad management of the defendant's ship, *by some persons on board*;—that the want of proper caution in putting the helm as it ought to be, occasioned his running on board the King's ship, and doing the mischief complained of,—and that that fact did not seem to be disputed on the trial.

1815.

Tuesday, 7th February.

The *Solicitor General*, *Jervis*, *Dauncey*, and *Peake*, now showed cause:

They contended, that there could be no doubt raised as to the liability of the owners at common law; and therefore the only question was, whether there were any thing in the statutes on which the rule had been granted, which could be construed as altering their situation, or exonerating them from that liability. They submitted, that the *Liverpool* Pilot Act in itself contained no such clause as the 30th sec. of the 52d *Geo.* III.—(which had been very improperly termed the general Pilot Act; for that act, extensive as its title might appear, was in fact confined to the pilotage jurisdictions therein mentioned),—exonerating the master and owners from responsibility for damage done through negligence while a pilot was on board. Then the question would be, whether there is any thing in that statute which does, by reference, operate to incorporate that clause in the local Pilot Act; and they argued, that, as that act expressly mentions whatever local pilotage jurisdictions it was intended to be applied to, wherever it furnishes any regulation with respect to them;

1816.

ATTORNEY GENERAL v. CASE and others.

where those local jurisdictions are not mentioned, the act cannot be construed to extend to them: and that each clause of the act relates exclusively to the pilots who are expressed to be the immediate object of it.

The *Liverpool* Act is not imperative as to the master's taking a pilot on board, and there is no penalty in that act for not doing so, as there is in the 52d *Geo.* III.; so that, if the master pleases, he may decline the services of a pilot on paying him his regulated allowance; and the true reason of the indemnifying clause in the 52d *Geo.* III. is, that the taking a pilot on board is compulsory.

This point was decided in the case of *Fletcher* v. *Braddick (a)*, where the owners of a ship chartered to the commissioners of the navy were held liable for damage done to another ship, notwithstanding there was a commander in the navy, and a King's pilot on board at the time; for the Court said, that the owners were the persons to be responsible, in the first instance, to third persons, leaving the subsequent adjustment to be arranged between the owners and the Crown. The owners are in all cases liable in the first instance; and that, however remote they may be from the immediate damage and cause of action, *(Bush* v. *Steinman (b).)* There is no doubt, therefore, of the defendant's liability, unless this clause exempts them. Then (if it can be for a moment admitted

(a) 2 N. R. 186. *(b)* 1 B. & P. 404.

that

1816.

ATTORNEY GENERAL v. CASE and others.

that that section can be applied to the *Liverpool* pilots) these defendants would still not be within its protection; for the clause was expressly made to indemnify the owners and master from the misconduct of the *pilot*, and that can only be referred to such misconduct alone as a pilot can be guilty of as such. Here the disaster was caused, not by the *neglect*, *default*, *incompetence*, or *incapacity* of the *pilot*, but by the gross *misconduct* (a word not in the clause, which adverts to acts of *omission* merely, and not of *commission*,) of the master and the whole crew; and will it be contended, that the circumstance of a pilot on board is to excuse the whole crew of the ill effects occasioned by their drunkenness and incapacity to assist the pilot? The very act by which it is in evidence the mischief was occasioned, is not one which it was a pilot's duty to avert: it was an act of the other persons on board, whose duty it was to have veered out the cable. And they cited the case of *Bowcher* v. *Noidstrom* (c) to the point, that a master is not discharged from liability for a trespass committed by order of his pilot.

It was ultimately urged (but not much insisted on, after the intimation of a contrary opinion from the Bench,) that in all events the Crown's right was not to be affected by the indemnifying clause, without express words, (citing Bacon's Abr. tit. Prerogative;) and that although there be no express saving of the King's rights, which is sometimes introduced

(c) 1 Taunt. 568.

ex

1816.

ATTORNEY GENERAL v. CASE and others.

ex abundanti cautelâ. For these reasons the verdict which the Crown has obtained ought to stand.

Scarlett, and *Joy,* in support of the rule.—Admitting the general doctrine of a master's liability for the acts of his servants, they urged, that inasmuch as the pilot taken on board the *Columbus,* under the express provisions of an act of parliament, was not the servant of the master of this vessel, but, as it were, of the Law;—as he was not appointed or chosen by the master or owners, who, so far from having any choice in the selection of a fit person, were compellable to take the first that should offer;—and as such pilot was, beside, a person over whom the master had no control, but who was himself, on the contrary, as well as his ship, subject to the guidance and authority of the pilot to whom the legislature had, during his being on board within the limits of his jurisdiction, transferred all command and the whole management of the ship;—the pilot, so far therefore from being a servant of the master, for whose acts he should be responsible, ought, in fact, rather to be considered (even independently of the indemnifying provision in the 52d *Geo.* III.) in justice and common sense, as a person to whom the common-law responsibility of both master and owners should, with their common-law free agency, (for it is indisputable that a pilot has the entire and exclusive control and management of the ship while he is on board acting as pilot,) be at once transferred. The pleadings admit that the act which occasioned the mischief must be charge-

able on the *servants* of the defendants, for their declaration is so framed *.

Where, indeed, the master takes a pilot of his own accord, and for his own accommodation, the case wears a very different complexion; but the present question arises solely on the ground of this case being out of the principle of the decisions holding masters responsible for the acts of their servants. Where no pilot is taken on board within a pilotage

* The reasons for holding the master responsible are, according to *Molloy*, Vol. 1, p. 358, B. II, cap. III, § xii. (resting on *Hern* v. *Smith*, Roll's Abridgement, 533,) which was cited by *Joy*, "For that the mariners are of his own "chusing, and under his direction and government, and know "no other superior on shipboard but himself: and if they are "faulty, he may correct and punish them, and justify the same "by law." No one of which reasons can apply to the pilot: for, as in Beawes, 203, "In many parts, where the entrance "to harbours, &c. is difficult the taking a pilot is not a volun-"tary act, but obligatory on the master; otherwise, in case "of a loss, he must make it good: and the following laws are "now in force concerning them in *England: After a pilot is* "*taken on board, the master has no longer any command of the* "*ship*; and the pilot is liable to an action for an injury done by "his personal misconduct, although a superior officer is on "board."

And precisely in this light are the paramount command of a pilot, and the necessity of admitting him, contemplated in the laws of *Oleron*, and in the French and Dutch ordinances. In those of *Wisbuy*, (the foundation for so great a part of the Marine Law of *Europe*,) it is said that a coast pilot shall, under certain circumstances, be taken on board, "though the "merchant" (usually in the simplicity of those times, (12th century) in the ship with his cargo,) "oppose it."—† So distinct was the pilot from the mere servants of the merchant.

† Ordonances de Wisbuy, Art. xliv.

jurisdiction,

1816.

ATTORNEY GENERAL v. CASE and others.

jurisdiction, underwriters have been held to be discharged, *Law* v. *Hollingworth (d)*; but in that case, if an unskilful pilot, duly qualified by license, had been taken on board, by whose incompetency a loss had been sustained, the question would have been much more difficult and important; for that would not have been a peril of the sea.

As to the cases cited:—In *Bowcher* v. *Noidstrom* the Court did not decide the point for which it has been cited, and so far the marginal note is not correct. And the case of the action against the captain of the *Russell* man of war, said to be alluded to by Mr. Justice *Lawrence* in the same report, is shown, in the case of *Nicholson* v. *Mounsey (e)*, to have been decided on the merits, and not on the objection there said to have been taken,—of the lieutenant of the man of war not having been the servant of the captain;—on the alleged rejection of which the defendant is also stated to have been held liable: for on the contrary it appears, by the same case in *East*, that in fact he succeeded. That same case of *Nicholson* v. *Mounsey* also is in point to the principle for which these defendants contend; for the result is, that the captain of the ship, although on board at the time, was held not liable for damage done during the time the vessel was under the command of the lieutenant, on the ground of the latter *not being a servant* of the former. Now here the defendants had even less control over the pilot than captain *Mounsey* had

(d) 7 T. R. 169. (e) 15 East, 384.

over

over his lieutenant: and they cited the case of *Lane* v. *Cotton (f)*. The case of *Fletcher* v. *Braddick*, which appears most to incline against that principle, they submitted, was distinguishable from the case of *Nicholson* v. *Mounsey* by its very position, which was, that the servants of those to whom the ship had been chartered were in effect (for purposes of responsibility) the servants of those who chartered her; for by the charter-party they had delegated their right to *make choice* of servants, and were therefore responsible for the choice which should be made. So owners are liable on a bill of lading, although the ship be chartered; and the person shipping goods on board of her might maintain an action on the bill of lading against the owners.

Then arises the question, whether the provision of the 30th section of the statute (52 *Geo.* III.) does not extend to all places having pilots appointed under the authority of local acts of parliament. The *title* is most general, "For the pilotage of ships on *the coast of England.*" A part of the preamble* also announces the generality of its object.

In

(*f*) Raym. 650, and 12 Mod.

* "And whereas acts of parliament have been passed for establishing separate and peculiar jurisdictions in relation to pilotage in certain ports, and on different parts of the coast of *England*, which, by reason of the same being limited, have been found insufficient to answer the good purposes intended thereby, and it is therefore necessary that more effectual regulations should be made in relation to pilotage on the coast of *England*; and whereas an act was passed in the forty-eighth year of the reign of His present Majesty, intituled,

1816.

ATTORNEY GENERAL v. CASE and others.

In usage, many of the mandatory clauses in that act are adopted and acted on in places having local jurisdiction in pilotage, although not required by the local acts,—as the provision of sec. 44, that the description of pilots shall be indorsed on their license, &c.—and sec. 49, that pilot-boats shall have black sides. Some of the penalties imposed by the act attach generally on *all* pilots *licensed* by virtue of *that* act, or *otherwise*, (see sec. 51.); so also in sections 53 and 59: all plainly showing that the legislature considered themselves as legislating for all those places; and if in one respect why not in all, wherever the provision is general and unconfined? Sections 57 and 58 also are general, and therefore applicable to local pilots, though not expressly named; and so are sections 71 and 72, and many others. And indeed it would be an anomaly to have a general law, as this is, which should not be applicable as extensively as it is contended on the part of the defendants, that the 52 *Geo.* III. is. The act is intended to be a beneficial one; and if it be so for the *Thames*, why should the *Mersey* be excluded from its advantages? And if there were any doubt as to its extension, it ought

tuled, '*An Act for the better Regulation of Pilots, and of the Pilotage of Ships and Vessels navigating* THE BRITISH SEAS,' which is now near expiring; and it is expedient that the same should be continued with alterations and amendments, as is hereinafter enacted; and whereas it is necessary for duly enforcing the laws respecting quarantine, on which the health of his Majesty's subjects essentially depends, that the names and places of residence of *all pilots in England* should be known by those whose duty it is to convey information respecting those laws from time to time to them."

for

for that reason to be as extensively construed as the language of it will admit. It has been urged, that it did not come within the pilot's province to prevent the act complained of;—the answer is, that however the crew might have been blamable in the end, it was the fault of the pilot, in the first instance, that the vessel was improperly moored; and it is in evidence, that when *M'Kenzie* went on board, and told the pilot that his helm was starboard, (as the fact was,) he answered that it was a-port, pretty much indicating the state in which he was at the time; yet the master is compelled by the *Liverpool* act to take a pilot on board, and to take the first that offers; and he has no power of rejection, (even for the grossest cause of dismissal,) or of punishment for misconduct.

As to the argument arising from prerogative of the Crown not being bound by the clause of indemnity without being expressly named, it was submitted, that this was not a case for extending that principle to the protecting provisions of a beneficial act;—that the King was bound by the navigation laws;—and that in sec. 28, and in that only, there was an express saving of the King's rights, but as that had not been pressed, it was not much argued.

The *Solicitor General* replied.

The Court said, that as they considered this a question of very great importance, they would take some future opportunity of giving their judgment.

Adv. vult.

THOMSON,

1816.

ATTORNEY GENERAL v. CASE and others.

THOMSON, *Chief Baron*, now delivered the opinion of the Court. (Having stated the facts of the case, from which it appeared that there had been great and culpable negligence and mismanagement on board the defendants' ship, arising from the drunkenness of the crew, and that his Majesty's ships had in consequence sustained very considerable damage,) his Lordship proceeded as follows:—

The question is, whether the owners of the *Columbus* are liable to answer to the Crown for the damage so done to his Majesty's ships, the amount of which it has been agreed shall be settled, if we should be of opinion that the Crown is entitled to recover.

On the part of the defendants it has been contended, by way of defence to this information, which is in the nature of an action on the case, that they are exonerated from all responsibility, because they had a pilot on board, at the time of the accident, in command of the vessel, to whom the master was compellable to give up the charge of the ship under the *Liverpool* Pilot Act; whereby they became entitled to the indemnity provided by the 30th section of the 52 *Geo.* III. ch. 39, which has been called the general Pilot Act, as I think, improperly; because its main object is, notwithstanding its title, the regulation of the pilotage of the Trinity-house of *Dentford Strond*, and the fellowship of *Dover*, *Deal*, and the *Isle of Thanet*, of vessels navigating the rivers *Thames* and *Medway*.—(*His Lordship read the preamble.*)—

The

The whole question will depend on the words of those two statutes.

On the part of the Crown, on the other hand, it was contended, that the mere circumstance of a pilot being on board the ship at the time when this accident happened, is not sufficient to do away the responsibility of the owners for the damage so done; for that this pilot was not forced upon the owners under the authority of any act of parliament, and that therefore it was their own act to have taken him on board.

There were several cases quoted in which the master and owners have been held liable, though, in point of fact, there had been a pilot on board; but those were cases prior to the 52d of the King, and none of them appear to apply very closely to the present. There was another point made, (but which does not appear to me to have any thing very material in it,) that, supposing these two acts of parliament, taken together, discharged the owners of the ship from their liability as between subject and subject; yet, that, for an injury done to a ship belonging to the King, they still remained liable, for that it requires express words in any act of parliament which is intended to affect the King: but it does not seem to us that that argument has any solidity in it. If the owner, under the circumstances, is not answerable for the acts done by the pilot, or for the carelessness of the pilot in general, it would make no sort of difference to whom that injury has been done, whether to a ship of the King, or of any of his subjects. It was not much insisted upon; but it was urged, and

1816.

ATTORNEY GENERAL v. CASE and others.

it therefore becomes necessary that we should give it as our opinion, that there is no foundation for saying that the excuse does not extend to any injury offered to a King's ship, provided it would be well founded in the case of a common person sustaining the same injury.

There is nothing, as I stated, upon this subject in the *Liverpool* local act of the 37th *Geo.* III, intituled, " An Act for the better regulation and encouragement of Pilots for the conducting of ships and vessels into and out of the port of *Liverpool.*" That act (after providing certain regulations about their appointment and examination, and the rate of remuneration for piloting ships into and out of the port of *Liverpool*) contains this clause, which is the only provision that can be conceived to relate to this subject:—" that in case the master or commander of any ship or vessel outward-bound, (with certain exceptions,) *who shall proceed to sea*, and shall refuse to take on board and employ a pilot so duly licensed, such master or commander *shall pay to the pilot*, who first, or who only, shall offer his service and shall be so refused, *the full pilotage*, according to the different rates and prices hereinbefore directed to be paid, in like manner as if the pilot had been received and employed in conducting or piloting such ship or vessel into or out of the port of *Liverpool.*"—In short, this act imposes no *penalty* on the master even for going to sea without a pilot, but only renders him liable to pay the wages which the pilot would have been entitled to, if he had thought fit to accept his services.

Now

1816.

ATTORNEY GENERAL v. CASE and others.

Now there is a penal clause in the 52d *Geo.* III. the title of which certainly purports, that it is—"An Act for the better regulation of Pilots, and of the pilotage of ships and vessels navigating the British seas." But though that is the title, it professes not to alter any local provisions for pilotage in other ports; this act, as I have stated before, relating only, or principally, to the river *Thames*, and ships passing to and from *Orfordness*, and so on. There certainly are some other of the clauses of this act of parliament of the 52d *Geo.* III. which were intended to be applied to the cases of pilots who are provided in local jurisdictions, but that is uniformly done by *express terms*; for wherever the act intends that there shall be that extension, it says so expressly.

I have read a clause from the former act, by which the master of an outward-bound vessel, who shall proceed to sea, and shall refuse to take on board and employ a pilot who shall offer his services, is rendered liable to pay that pilot *the same wages* as if he had accepted his services; but the 52d *Geo.* III. cap. 39, sec. 59, seems to have made a provision in such a case, not only that he should pay the wages due to such person, *but a penalty also*. That clause enacts,—"That the master of every ship or vessel which shall be piloted or conducted by any other person than a duly licensed pilot, within any limits for which pilots have been or shall be appointed by any lawful authority,"—(which is certainly the case of *Liverpool*, for that is a place in which pilots are appointed by lawful authority,)—

1816.

ATTORNEY GENERAL v. CASE and others.

"shall *forfeit double the amount of the sum which would have been demandable for the pilotage of such ship or vessel*,"—(the other act had only made him pay the single price of the pilotage,)—"and also,"—(and this part certainly does not apply to *Liverpool* pilotage,)—"an *additional penalty of* 5*l.* for every fifty tons burthen of such ship or vessel, if the corporation of Trinity-house of *Deptford Strond*, as to cases in which pilots licensed by or under that corporation shall be concerned, or the Lord Warden for the time being, in all cases in which the Cinque Ports shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty." Now that part of the clause certainly does not apply to this case, for it has nothing to do with the jurisdiction of the Trinity-house. There are several other particular clauses, not relating to the responsibility of the pilots, but which speak in general terms of their being to be adopted in every case of local pilotage.

(His Lordship then adverted to the 30th section of the 52 *Geo.* III. which he read, marking the last words, "under or in pursuance of any of the provisions of *this act*;" and continued:)—Now a pilot taken on board in the port of *Liverpool*, is not taken on board *under and in pursuance of any of the provisions of the* 52 *Geo.* III, but under and in pursuance of the provisions of an act of parliament made long before that period, to regulate the pilotage in the port of *Liverpool*. And in that *Liverpool* Act there is no such clause to be found as

1816.

ATTORNEY GENERAL v. CASE and others.

as there is in this, which is called the General Pilotage Act: improperly enough so called, because, as I have stated, it relates to pilotage only in a certain district; except where, by certain clauses, positive enactments are made that it shall extend to places where there is a local jurisdiction independent of this act of parliament.

There is, therefore, no obligation imposed by the 37 *Geo.* III. upon the master, to take any pilot whatever on board his vessel *before she proceeds on her voyage*; for the consequence of his refusing to take a pilot on board, on other occasions, is only a liability to pay the same wages as if he had taken such pilot on board. Now, if he was proceeding to sea, having taken such pilot on board; and if, while the ship was duly and properly under the management of that pilot, an accident had happened, it might have been a fair question, whether the owner would then have been answerable; though there have been cases which show, that though a pilot may be on board, the master is in some instances deemed responsible, notwithstanding. But, I repeat, there is no such penal provision in this act of the *Liverpool* Pilotage. By the 34th section of that act, indeed, it is provided, "that if the owner, master or commander, shall require the attendance of a licensed pilot on board any ship or vessel during her riding at anchor, or being at *Hoylake*," (which is lower down than *Liverpool,*) "or in the river *Mersey*," (that is, while she is riding at anchor,) "such pilot shall attend such ship or vessel, and be

1816.

ATTORNEY GENERAL v. CASE and others.

paid for every day he shall so attend, five shillings, and no more." So that there is nothing here compulsory upon the master or owner to take on board a pilot, *while he is riding at anchor in this river Mersey*. It is optional in him whether he will do it or not; but, if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His *obligation* to take a pilot (even if the act of the 37th is to be taken as connected with the act of the 52d of the king,) is only on his proceeding to sea, and refusing to take on board a pilot so licensed. There is no penalty for not taking on board a pilot, while lying in the river *Mersey*; but he is *enabled*, if he thinks fit, (and not otherwise,) *to command the services of a pilot* while so lying at anchor, paying for him at the rate here specified: and it is *for that accommodation* that he is *to pay the five shillings*, if he refuses to take the pilot on board. The master of the king's ship states, that this vessel was outward bound; she had been lying there a considerable time; she was not, at this time, proceeding on her voyage. The master seems to have made his election to have a pilot on board, though she was lying entirely at anchor, and not proceeding upon her voyage. Then, what is there in this case which authorises the Court to say, that the master is not responsible, under the circumstances which have been so detailed? He was not compellable at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was his own act to have him; and it can be

1816.

ATTORNEY GENERAL v. CASE and others.

be only in the case of such an officer having been forced upon them, and without his own election, that the responsibility of the owner can possibly be discharged.

I believe I have stated as much as is material. Upon the whole, we are of opinion, that this action is well maintained; and that there is nothing in the evidence to excuse the liability of the owner, to answer for the injury that was done by the defendant's vessel to the King's ship: consequently, that the verdict, which is taken for 206*l.*, ought to stand.

Judgment for the Crown.

1816.

Monday, 23d December.

The KING *v.* ELLIS.

THIS was a proceeding by *scire facias*, for the penalty of the common bond given by the defendant to the Crown as a country auctioneer. The defendant pleaded a general performance of the condition. The replication set out,—that the defendant, on the 13th of *July* 1813, made a sale out of the limits of the chief office of Excise, and that he did sell by auction, the tithe of certain corn growing on certain lands, and divers other goods and chattels;

Tithes are a *tenement*; and are, as such, within the exemption (in 19 *Geo.* III. ch. 56, s. 14,) from the duty on sales by auction imposed by the 43d *Geo.* III. ch. 69, schedule A.

A letting by auction of tithes of corn, then standing and growing on the ground to be transferred by way of lease for one year, to commence from before the day of the auction, is a *letting* by auction of the *tenement*, and not a *sale* of the *tithes*: and that, although no actual lease should be afterwards made of such tithes.

1816.

The KING v. ELLIS.

but that he did not after the sale, within the proper time, deliver to the person appointed to receive the same, a particular account in writing of the total amount of the money bid at such sale. Another breach was assigned, for a like selling by auction of another parcel of tithes of other lands, on a different day.

To these breaches, so assigned, there was a rejoinder,—that one Mr. *Roberts* was rector of the parish, and being such rector, and desirous of letting for a term of years certain tithes of corn which belonged to him as rector, the tithes not being then cut, and being tenements, employed the said *John Ellis* to hold an auction, to let the tithes for a certain term of years, on his, the rector's, account; and thereupon the said *John Ellis*, as such auctioneer, on the rector's account, on the 13th of *July* 1813, did, on account of the rector, hold an auction for the letting the said tithes for a term of years to be created by the rector.—That the defendant, at such auction, on the rector's account, let the tithes to one *William Jones*, for a term of years, to be created by the said *John Roberts* as such rector; and that the supposed sale of the tithes mentioned in the breach, was the letting of these tithes; and that the tithes, that is, the corn and tithes which were so let, were then growing. There was also a rejoinder to the other breach, which was assigned for selling another quantity of tithes, on another day, arising on other lands; which averred, that this was not a sale, but was a letting of the tithes, and that those tithes were a tenement.

The

1816.

The KING v. ELLIS.

The cause was tried at the Sittings after *Trinity* Term, when a verdict was taken for the Crown, subject to the decision of the Court on the points reserved; which were afterwards made the ground of a motion, that that verdict might be struck out, and a verdict entered for the defendant.

On that motion being made, the rule was granted accordingly, on the ground that this auction was within the exemption (of the 14th section of the 19th *Geo.* III. ch. 56 *,) from the duties imposed by the 43d *Geo.* III. ch. 69, sched. A †.

It

* "Provided also, that nothing in this Act contained shall extend to any auction to be held, on the account of the lord or lady of any manor, for the granting any copyhold or customary messuages, lands, or tenements, (caret "*hereditaments*") for the term of a life or lives, or any number of years; or to any auction to be held for the letting or demising any messuages, lands, or tenements, for the term of a life or lives, or any number of years, to be created by the person or persons on whose account such auction shall be held; or to the sale or sales of any woods, coppices, produce of mines or quarries, or to any contract relating thereto, or to the cutting or working the same, or to the sale of any materials used in the working of such mines or quarries respectively; or to the sale of any cattle, and live or dead stock, or unmanufactured produce of land; so as such sale or sales of woods, coppices, produce of mines or quarries, cattle, corn, stock, or produce of land, be made whilst they continue on the lands producing the same, and by the owner or owners of such lands, or proprietor or proprietors of, or adventurer or adventurers in, such mines or quarries respectively, or by his or their steward or agent, stewards or agents; any thing herein contained to the contrary notwithstanding."

† "For every twenty shillings of the purchase-money arising

1816.

The KING v. ELLIS.

It appeared by the report to have been given in evidence,—that, antecedent to this sale or letting, the auctioneer had delivered to the proper officer this notice:—"To the officer of Excise at *Pwll-*"*helli:* Take notice, that I shall let by auction to "the highest bidder, at the village of *Aberdaron*, "on *Monday*, the 26th of *July* instant, in eight "parcels, all those tenements and hereditaments, "consisting of the rector's share of the great "tithes arising, growing, and becoming due in "the parishes of *Aberdaron* and *Llanfaebrhys*, for "one year, commencing on *St. Peter*'s Day last past. "Dated the 9th of *July*." There was also added, "A catalogue of the tenements and hereditaments "intended to be let by me by auction, at *Aber-*"*daron*, on the 26th day of *July* 1813, in eight "lots or parcels, the tithes of corn arising, grow-"ing, and becoming due in the parishes of *Llan-*"*faebrhys* and *Aberdaron*."

The conditions of the letting, which were produced at the time of sale, were as follows, "The

ing or payable by virtue of any sale at auction in *Great Britain*, of any interest in possession or reversion, in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or *hereditaments*, and any share or shares in the capital or joint stock of any corporation or chartered company, and of any annuities or sums of money charged thereon, and of any ships and vessels, and of any reversionary interest in the public funds, and of any plate or jewels, and so in proportion for any greater or less sum of such purchase-money, to be paid by the auctioneer, agent, factor, or seller by commission.

tithe

1816.

The KING v. ELLIS.

"tithe of corn arising, growing, and becoming due "in the parishes of *Llanfaebrhys*, in the county of "*Carnarvon*, with the hereditaments and appur- "tenances thereto belonging, on the 13th day of "*July* 1813: First, that the highest of three or "more bidders shall be the taker or tenant; and if "any dispute shall arise as to the biddings, the "lot shall be put up again. Secondly, that the "tithe of corn shall be put up in ten lots or parcels, "and shall be let for one, two, or more years, as "shall be agreed upon, on putting up the same. "Thirdly, that all the taxes (except the landlord's "property tax) shall be paid or borne by the takers "or tenants. Fourthly, that the rent or rents at "which lot shall be let, shall be payable on the "1st day of *July* 1811; and the taker or takers "shall, if required, find sufficient sureties for the "payment of such rent. Fifthly, that the pro- "prietor of the said tithes will, at his own ex- "pense, execute a demise or lease of the said corn "tithe, to the takers thereof respectively, subject "to the foregoing conditions. Sixthly, that the "owner or proprietor of the tithes shall be at "liberty to bid once for each lot, at such time as "he shall think proper."

The like notice was given, and the like conditions declared, as to the letting of the tithes of the other part of the parish, and that the proprietor would, at his own expense, execute a demise or lease of the corn tithe, to the person who should take them.

The

1816.

The KING v. ELLIS.

1814. 24th November.

The *Solicitor General*, *Dauncey*, *Clarke*, and *Walton*, now showed cause; and they made these two points:—first, that the tithes so said to be let, were not a tenement within the meaning of the act, and therefore not within the exemption:—and, secondly, if they were, that that which had been called a *letting*, was, in point of fact, a mere sale by auction; and that the mode which had been adopted for the disposal of the tithes, was so far merely colourable (not fraudulently so,) for the purpose of avoiding the duty. That duty, as imposed by the 43d *Geo.* III. ch. 69, sched. A, was what was sought to be recovered by the present proceeding, on which the Crown had obtained a verdict which it was entitled to retain, unless the subject of the sale in question could be brought within the exemption of the 19 *Geo.* III. cap. 56, sec. 14, as being comprehended under any one of the terms used in that excepting clause. Tithes, they admitted, have been from time to time invested with many of the common-law attributes of tenements, by several statutes; but those statutes had not put tithes, which are in fact, at common law, merely incorporeal hereditaments, on the footing of tenements in all respects, or at all changed their nature; nor have any of the statutes which relate to tithes, ever called them a tenement. The 32d *Hen.* VIII. cap. 7, sec. 7, which rendered tithes, in lay hands, subject to the same modes of conveyance and recovery as lands and tenements, clearly treats tithes as an incorporeal hereditament, and so distinguishes them; for there is nothing which can be properly called a tenement,

for

for which the *præcipe quod reddat* would not lie before that act; and it is only on that statute that an ejectment will lie for them, which had never been heard of before, and was afterwards at first doubtful. The 5th *Geo.* II. cap. 17, which was passed to remove doubts as to whether tithes might be leased by certain ecclesiastical corporations, enacts, that certain leases for lives, granted of tithes, tolls, *or other incorporeal hereditaments*, shall be good and valid; treating tithes as an incorporeal hereditament, contradistinguished from tenements. This very *exemption* on which the question now arises, also, has expressly enumerated messuages, lands and tenements only; *purposely*, it should seem, excluding hereditaments, which the *schedule* embraces, and the exemption must be construed by the letter: and, but for the exemption, it is clear that tenements let by auction would be liable to the duty; therefore, if tithes are not a tenement, but a hereditament, they are not exempt.

But if that be not so, the second objection arises, that this was not a *letting* by auction of the *tithes*, but a *sale* by auction of the subject-matter. Now all that was actually sold, was a tenth of the crop on the ground. Tithes, as such, are not properly the subject of a lease or demise; they are an incorporeal hereditament, and lie in grant; and they must be conveyed by deed, for they are not capable of livery. And the common cases of letting tithes by parol, as (to instance one) the usual composition between the tithe-owner and the farmer, is not a letting, but a sale, and good as a sale only. And although

1816.

The KING v. ELLIS.

although those compositions generally take place between the tithe-owner and the occupier of the land, it would be just the same thing if the tithes were so sold to a third person. And to that point, the case of *Hawkes* v. *Brayfield (a)*, was cited; where the Court held, that there could be no agreement of retainer of tithes (by parol) "for many years," (which sounds in nature of a lease) although they said that the law would permit it for a year, "it being given *by way of sale*;"—and that of *Keddington* v. *Bridgman (b)*, to the same effect*. As to the case of *Hewett* v. *Adams (c)*, that was decided merely on the principle that a composition by six months notice only, with reference to leases, ought to prevail in favour of the farmer: but that case does not decide, that there can be a parol demise of tithes, which being an incorporeal hereditament, can only lie in grant. As to what may have been inserted in the conditions of sale, that is neither binding on the parties, or conclusive as to the question of law,—of its being a letting of the tithes, or a sale, or of the actual sale being of what was expressed to be intended to be sold, in point of fact. Then, looking to the thing actually sold, that which has been called a lease of tithes, was nothing more or less, in truth, than the tenth part of a crop of corn nearly fit to cut, then standing on the

(a) Cro. Jac. 137. (b) Bunb. 2.

(c) Rayner's Tithe Cases, 990; and Gw. 1204, there called *Adams* v. *Waller*.

* Vide *Keddington* v *Adamson*, 2 Gw. 611.

ground,

1816.

The KING v. ELLIS.

ground, actually sold in the month of *July*, under colour of a lease to commence from a day passed, from the previous *St. Peter's* Day to the one next following: and a growing crop is considered part of the personal stock of the farmer, and may be taken in execution.—These tithes, therefore, were not the subject of a letting, by parol, at all. The letting relied on, was neither more or less than a sale of the subject-matter; and that which has been called a lease, has not the usual characteristic qualifications of a right of entry on one side, or a reversionary interest on the other. The consequences to the revenue, of deciding this sale to be a letting of the tithes by auction, would be an evasion of the stamp duties, as a lease; and of the auction duties, as a sale.

Scarlett, *Abbott*, *Littledale*, and *Carr*, in support of the rule, submitted, that it was most improbable that while the legislature contemplated an exemption from this duty in favour of the landowners, and of persons having an interest in land, they should mean particularly to exclude all the clergy, and the lay impropriators of *England*, from the benefit of that exemption.

The first question is, whether tithes are a tenement. Tenement is certainly a word of most extensive signification, and embraces, in its etymological sense, every thing which may be holden; but its legal signification extends much further, for in *Co. Litt.* fo. 19. b. the word tenements is said (speaking of the stat. *Will.* II. which created estates tail,) to include "not only all corporate inheritances which may

1816.

The KING v. ELLIS.

may be holden, but also all inheritances issuing out of them, or concerning or annexed to, or exerciseable within the same, though they lie not in tenure: therefore, all these, without question, may be entailed. As rents, estovers, commons, or other profits whatsoever, granted out of land, or uses, offices, dignities which concerne lands or certaine places, may be entailed, because all these savour of the realtie."—It cannot be doubted, then, that tithes come under that description of the meaning of the word tenement *. The cases which hold that tithes are considered a tenement, under the acts of parliament relating to parochial settlements, are too numerous to require to be cited; but they quoted a case from *Strange*, the *King* v. *Skingle (d)*, where the Court held—that tithes were a tenement. In the case of *Sone* v. *Ashton (e)*, the office of marshal of the King's Bench was held to be a tenement. And under a grant of lands and tenements, tithes, no doubt, would pass.

But then it is urged, that various acts of parliament have treated them as not being a tenement; and have therefore provided, on that account, many of the advantages in favour of persons entitled to them, peculiarly belonging to that class of property. The first statute which is said to have done so, is that of 32 *Hen.* VIII. cap. 28. Now that act was passed with a very different object; it was intended to give to lay persons, who could not, before the dissolution of the monasteries, legally hold tithes, nor

* Vide Com. Dig. tit. Grant (E. 2.) Tenement.

(d) 1 Strange, 100. *(e)* 3 Bur. 1288.

had,

had, afterwards, any right to sue for them in the ecclesiastical courts, the same remedies as they had at common law for the recovery of their temporal possessions; and that object is to be collected from the preamble of the act. That preamble also furnishes an acknowledgment of a capacity in tithes to be made the subject of entail; for it speaks of lay persons having parsonages, and vicarages, and *tithes*, to them, and to the heirs of their bodies lawfully begotten. Now tithes could only have been held by a man, to him and the heirs of his body, by virtue of the statute *de donis*, which enables persons to create entails; and that statute only speaks of lands and tenements, and says nothing of hereditaments. It is clear, that tithes are as commonly the subject-matter of entail, as any other species of property. That argument is an answer to those which have been drawn from the statutes said to distinguish tithes from tenements, as being, in truth, merely hereditaments, and is itself, at the same time, unanswerable. The argument—that before that statute, ejectment did not lie for tithes,—may be met by showing, that ejectment does not at this time lie for many things coming within Lord *Coke*'s description of a tenement; as for rent, and all those things of which the sheriff cannot deliver corporeal possession. But, in point of fact, the word hereditaments is to be found in that statute, and also in 1 *Eliz.* cap. 19, and 10 *Eliz.* cap. 10; in which last it is actually classed with tenements. As to the statute of the 5 *Geo.* III. cap. 17, that was made with a view to remove certain doubts as to what persons were within the enabling statutes of *Elizabeth*; but the

1816.

The KING v. ELLIS.

very existence of moduses, at this day, show that tithes were long before memory alienable, and might be let in fee at a certain fixed rent: and that also is an answer to the proposition, that tithes are not properly the subject-matter of demise. Tithes are said to lie only in grant. Be it so. A lessee is a grantee, and a lease is nothing different from a grant of an interest in the thing leased. The 5 *Geo.* III. uses the expression, "leases of tithes"; and therefore recognizes their existence, and their legality. Being capable of being let, they must be capable of being holden: it cannot, therefore, be doubted, that tithes are considered a tenement by usage, and legislative recognition.

Then arises the point as to this being a sale, and not a letting of the tithes. All imputation of fraud must be considered as out of the question. Now as one test by which that question may be determined, —suppose the clergyman had refused to execute a lease on this sale, or any other instrument, would not a Court of Equity have compelled him to do so? or would they have said that this was a mere case of bargain and sale? But if it be either a sale or a letting, the conveyance must be perfected by deed: and on this evidence, as reported, the clergyman would be decreed to grant a lease, with a covenant, that he should pay the landlord's property-tax, and the tenant to pay all other taxes except the land-tax; and to seal it, that they might be enabled to sue the farmer for not setting out the tithes. At the time of the auction the best bidder did not actually purchase a lease at the sale, but the power of compelling one;

one; and with the subsequent result, as to what afterwards took place between the parties, the *auctioneer* could have nothing to do, so as to become chargeable under this act; *his* duty is all to be performed at the time of the sale. But in point of fact, it is quite obvious, that the tithes could not be sold *speciatim*, as tithes, till actually set out by the farmer, and *reduced into the possession of the tithe-owner*.

As to the argument used from the cases cited, to show that there can be no lease for one year of tithes by parol, that would be equally applicable to a lease contemplated to be made for twenty years, being so sold by auction. And the instance put, of a composition, which six month's notice is required to determine, is very distinguishable, because that is a continuing agreement. Nor are the usual compositions good by reason of their being to be considered as *sales*, but because they are to be taken as special *agreements* between the parties, that a pecuniary payment shall be made in lieu of the tithes in kind. Every lease is a sale of an interest in lands, &c. in point of fact. If it were not, a letting or demising would not be within the original enactment imposing the duties. There can be no doubt, that a lease for a year may be made of tithes by parol; and therefore the fact, that there has been in this case no lease in writing, does not make the letting of the tithes for a year less a demise.

The *Solicitor General*, in reply, insisted, that there was an essential distinction between *tithes*,

1816.

The KING v. ELLIS.

and the *rectory* to which they were appurtenant; the latter is the tenement, the former the profits of it;—the corporeal object of the incorporeal right. So an office, as in the case of *Sone* v. *Ashton*, is a tenement, but the salary or perquisites are not. If a common in gross may be considered to be a tenement, as it is said it may be in *Comyns*'s Digest, although that statement is followed by one contradicting it, and there is a doubt referred to, in a case in 2 *Rolle*'s Abr. 57, l. 5, 7;—but tithes disannexed never can, because they are of a corporeal nature. The case cited from *Strange*, of *Sone* v. *Skingle*, was that of a person having a title to tithes by his tenement of the parsonage, who was therefore held liable to be rated to the poor's rates, although tithes were not mentioned in the private statute authorising that rate in *Colchester*, as they are in the general act of 43 *Eliz.*; for a private statute could not repeal the provisions of a public act; and the circumstance of tithes being expressly mentioned there, in addition to tenements, is another proof that they were not considered to be tenements by the framer of that act.

The Court, in consideration of the importance of this case, which had been so elaborately discussed, took time to give judgment.

Cur. adv. vult.

THOMSON, *Chief Baron*, delivered the judgment of the Court.—[Having stated the pleadings, the evidence, the notices, and the conditions of sale: observing that the 5th condition was very material.]

The

1816.

The KING v. ELLIS.

The question (continued his Lordship) is, whether this auction was of such a nature as to come within the exception provided by the 19 *Geo.* III. cap. 56, sec. 14, of certain subject-matters, which would otherwise be liable to the duty imposed on auctions by the 43 *Geo.* III. cap. 69, sched. A.

And that question depends on the construction of these acts, taken together;—and on the result of our inquiry, whether the circumstances of this case show that this transaction was a *letting* of the tithes by auction:—and whether (if it was a letting) it was a letting of a *tenement*, within the meaning of the exception in the first of these acts of parliament;—or whether it is to be deemed an absolute *sale* by auction of these *tithes*.

Now, as to the expression,—'a tenement,' there is no question but that, in common parlance, the word tenement would be taken to comprehend tithes: and I take it, it would do so, in many instances, in the legal acceptation of the meaning of the term. Tithes, as we know, (those that have become lay-fees,) are capable of being entailed, and may be limited to the heirs of the body; and those entails will be preserved by the statute *de donis*. But under what words are they protected? There is no other word used in the statute *de donis* but that of *tenement*. Every thing, therefore, which is rendered capable of being so limited under that statute,—as manors, messuages, lands, tithes,—every thing which may be entailed,—is included under the word

1816.

The KING v. ELLIS.

tenement. Therefore it seems to be a very narrow construction to say that tithes are not, upon this occasion, to be deemed a tenement, provided this was a letting, and not a sale of the thing in question: for if it were a sale, undoubtedly the auction-duty would attach.

There are several cases which have decided that tithes are a tenement, independently of the general doctrine arising on the statute *de donis*. The *King* v. *Skingle*, in 1 *Strange (f)*, has precisely this point. There the clergyman of the parish of *Colchester* was rated to the poor-rates, in respect of his tithes, as a tenement, under a private statute made for the provision of the poor of *Colchester*. The general act (43 *Eliz.*) had *expressly* charged lands, tenements, *and tithes*; but the subsequent private act charged only lands and tenements, (omitting tithes:) yet the Court held the parson liable, as being an occupier of a tenement, for that tithes were a tenement. And many other authorities are there quoted, particularly *Co. Litt.* 159; where it is said, "that an assize lies for tithes; that the husband would be tenant by the courtesy, and a wife would be endowed."

It was ingeniously argued, that although commons in gross, and offices, might come under the term tenement, tithes could never fall under that term, because they are corporeal things; but that argument does not appear to us to be at all well founded.

(f) 1 Strange, 100.

The

1816.

The KING v. ELLIS.

The next question is, whether this was a *sale* of the *tithes*. Now that depends upon the nature of the thing which was put up to be sold. The clergyman would no doubt have had a right, at the ensuing harvest, to receive these tithes; but he had no right to take them till after they were reaped, nor till they were set out. At the time of this transaction the corn was standing, and he agreed to let his interest in it: that was the nature of the transaction. He agreed at the auction, according to the terms used in the excepting clause of the act, to let the tithes for a term, to be appointed by himself; and that is clearly within the words of the exception in the 19 *Geo.* III. He puts them up to a letting, and the best bidder is to take them for one year, (to commence from about a month before the sale; but that makes no difference,) till the return of that period on the first, second, or third year following. The tithes were then growing; and the purchaser, or tenant (if he may be so called,) had no right to these tithes till they were taken and severed. And it seems to me, that was rather a bargaining with the clergyman for such interest as he could convey, than any thing else: that is, that the person who was to take the tithes was to have the clergyman's remedy for the tithes. And how was he to have it? he could not take it by a sale; no property could be transferred in the tithes, so as to enable him to take them when they became due in any way. He could only take them under a lease from the clergyman, (for it is part of the conditions, that the clergyman should grant him a lease,) which would enable him to sue the tenant of the land; and without such a lease he could have no power whatever, when the right to

1816.

The KING v. ELLIS.

the tithes accrued, of enforcing his agreement with the parson against the farmer. Without a lease, the tenant of the land would not be bound to render the tithes to him, and that is therefore expressly provided for by the conditions of sale under which this auction was held. This transaction, therefore, seems to be a letting of the tithes for one year;—an agreement, that the rector shall invest the tenant (that is, the person who agrees to take these tithes) with powers to enable him to recover them, which could only be done by making him a demise for that year; without which, he could not, by any means, (if the tenants were adverse,) compel them to pay. He must state himself (which is the common way) to be farmer of those tithes, in his declaration for not setting them out: for he can have no authority to make use of the clergyman's name, and probably the clergyman would not be very willing that he should use his name: but that difficulty would be got rid of by a demise for a year; which would enable him to declare, as farmer of the tithes, against the person who refused to set them out. It appears from the evidence in this case, that the tenants not resisting the claim, the tithes were, in point of fact, taken without a lease being actually granted. But that does not appear to me to make any difference; the question is, what would be the remedy, if the tenants had refused to pay the tithes to the purchaser till he clothed himself with the character of lessee of the clergyman. That appears to us the essence of the whole of this case. And we think that this auction comes within the exception of the act of parliament: and that it is not to be deemed a sale of these tithes; but a letting of a tenement by auction, within the words

words of that exception. And therefore we are of opinion, that the judgment in this case ought to be, that the verdict taken for the King should be entered for the defendant.

1816.
The King v. Ellis.

Judgment for the defendant.

---

1 Kay 597
5 Bea 439
9 do 456
11 do 513
1 Calls 384

6 Del Mu Gr Hs 2 81.
22 Ch D. 208

1816.
Monday, 23d December.

The King v. Bates.

The several instruments (called bonds) given for securing, on the parish rates, the payment of 100*l.* each (and interest) to the holder, by parishes enabled to borrow money by such means under the local Paving Acts;—held not to be a mere chattel, but a charge on the owners of houses, &c. in respect of such houses, &c.: and therefore, when sold at auction, are not liable to the higher auction duty imposed on the sale of chattels by the 43d *Geo.* III. ch. 69; but to the lower duty, as being a sale of an interest in lands, &c.

And such instruments would come within the statutes of mortmain.

THIS was a proceeding by *scire facias* against the defendant, who was an auctioneer, for the penalty of his bond to the Crown, for not having accounted for the duties on a sale by auction of certain securities issued by the parish of *St. Mary-le-bone*; under the 35th *Geo.* III. ch. 73, and 53d *Geo.* III. ch. 163.

The cause came on to be tried before the *Lord Chief Baron*, at the Sittings after *Michaelmas* Term 1814. On the pleadings being opened, it was agreed by the Counsel that a verdict should be taken for the Crown, subject to the opinion of the Court upon the following case:

"That the defendant, being a licensed auctioneer, gave a printed notice and catalogue at the chief

office

1816.

The KING v. BATES.

office of Excise, for holding an auction-sale of sixty-five bonds for 510*l.* each, granted by the parish of *St. Mary-le-bone* under the act passed in the 35th year of the King, ch. 73. Those bonds are in the following form: We, the vestrymen of the parish of *St. Mary-le-bone*, in the county of *Middlesex*, by virtue of an act of parliament made in the 35th year, &c. intituled, 'An Act for repealing severa Acts made in the 8th, 10th, 13th, and 15th years of the reign of his present Majesty, for regulating the nightly watch and beadles, and for paving, repairing, cleansing, and lighting the parish of *St. Mary-le-bone*, in the county of *Middlesex*; and for the better relief and maintenance of the poor thereof; and for divers other purposes therein mentioned, and for making more effectual provision for those purposes;' and of an Act of the 46th *Geo.* III. intituled, 'An Act for altering and amending an Act made in the 35th year of his present Majesty, for watching, paving, cleansing, and lighting the parish of *St. Mary-le-bone*, and for the better relief and maintenance of the poor thereof;' and also of another Act of Parliament, made in the 53d of the King, intituled, 'An Act for altering and amending two several Acts of the 35th and 46th years of the reign of his present Majesty, for paving and improving the parish of *Mary-le-bone:*' And whereas it is enacted by this last act, that it should be lawful for the vestrymen to grant to their treasurer for the time being any bond or bonds under the hands and seals of the said vestrymen, or any seven or more of them, for the sum of 100*l.* on each bond, with interest for the same after the rate of five *per cent.*

per

1816.

The KING v. BATES.

per annum, upon the credit of the rates or assessments authorised to be collected by virtue of the before-mentioned recited acts, for paving the squares, streets, passages, and other places in the said parish; and also that it should be lawful for the treasurer, by direction of the vestrymen, from time to time to make sale and dispose of all and every of such bond or bonds so to be granted, unto any person or persons, for the best price or prices in money that could reasonably be had or obtained for the same: Now these presents witness, that in consideration of the sum of five shillings, paid to us by *Thomas Birch* and *Abraham Chambers*, of, &c. esquires, the joint treasurers appointed under the said first recited act *do assign* unto the said *T. B.* and *A. C.* their executors, administrators or assigns, *the rate or assessment* made and to be made for new paving the squares, streets, &c. within the limits of the first recited act, of the said parish, To hold unto *T. B.* and *A. C.* their executors, administrators, or assigns, until the sum of 100*l.*, together with the interest at the rate of five *per cent. per annum*, such interest to commence or to be calculated from the ..... day of ....., shall be fully paid and satisfied. In witness whereof we have hereunto set our hands and seals, the day, &c."—That on the 20th *July* 1813, the defendant held an auction-sale pursuant to his notice; and at that sale sold by auction the sixty-five bonds mentioned in that notice, at the several prices mentioned in the catalogue delivered in by him.—That *Thomas Bates* the younger, being the defendant's clerk, (and who as such, attended the sale,) went to the chief office of

1816.

The KING v. BATES.

of Excise in *London*, on the 20th of *August* 1813, for the purpose of settling and paying the duty on the sale; and then and there produced to the proper officer, at the said chief office, a printed catalogue, as follows:—"Particulars and conditions of "sale of sixty-five bonds, of 100 *l.* each, bearing "an interest of five *per cent. per annum*, payable "at the Court-house of the parish of *St. Mary-* "*le-bone*, half-yearly, and secured under an act "of parliament, directing and authorising the "vestrymen of the parish of *St. Mary-le-bone* "to raise money on bonds, for the purpose of paving "the squares, streets, &c. within the limits of the "said act; subject to redemption by way of a "sinking fund, as directed and authorised by the "act; which will be sold by auction by Mr. *Bates*, "at the Auction Mart, &c. on *July* 20th, 1813, "in sixty-five lots." (The particulars set forth were these bonds in sixty-five separate lots, the total amount of the sale prices being 5,261 *l.* and underneath was written, by the auctioneer's clerk,—Duty on that sum, at seven-pence, 153 *l.* 8 *s.* 11 *d.*; but the auction duties were not paid, being refused to be received *at that rate.*)"

The auction duties at the time of the sale, under the 43 *Geo.* III. sec. 69, sched. A, and the 45 *Geo.* III. cap. 30, were these:—"For every twenty shillings of the purchase money arising or payable by virtue of any sale at auction, in *Great Britain*, of any interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, and hereditaments,

ments, or any share or shares in the capital or joint stock of any corporation or chartered company, and of any annuities or sums of money charged thereon, and of any ships and vessels, and of any reversionary interest in the public funds, and of any plate or jewels, and so in proportion for any greater or less sum of such purchase money, to be paid by the auctioneer, agent, factor, or seller by commission, sixpence."—"For every twenty shillings of the purchase money arising or payable by virtue of any sale at auction, in *Great Britain*, of furniture, fixtures, pictures, books, horses and carriages, and all other goods and chattels whatsoever, and so in proportion for any greater or less sum of such purchase money, to be paid by the auctioneers, agent, factor, or sellers by commission, ten-pence*."—That the proper officers of Excise objecting to the defendant's above calculation of duty, at 7 *d.* in the pound, and insisting that the sale was liable to the higher duty of one shilling in the pound, demanded the duty at such higher rate. The defendant's son, however, refusing to pay such higher duty, offered to pay the lower duty of sevenpence in the pound, and the officer refusing to take less than one shilling in the pound, the sale still remained wholly unaccounted for; and no duty whatever had been paid for the sale. The question was, which duty was to be paid; if the higher, the verdict to stand; if the lower, the verdict to be entered as satisfied.

* The 45th *Geo.* III. ch. 30, imposed an additional duty of 1*d.* in 20*s.* on articles mentioned in the first member of the schedule, and 2*d.* in 20*s.* on those of the second.

The

1814. *Tuesday, 14th November.*

The cause was this day argued, by

The KING v. BATES.

Walton, for the Crown: and

Adolphus for the defendant; when the Court requiring a second argument, it was re-argued, by

1816. *22d June.*

Clarke, for the Crown: and

Harrison, contrà.

The statutes, the arguments, and the cases, are all so fully gone into by the *Lord Chief Baron*, in delivering his very elaborate and comprehensive judgment, that it will not be necessary here to give more than an outline of the arguments used on either side.

For the Crown it was submitted, that these bonds were merely transferrable *chattels*, and created only personal liability, and could in no sense be considered as a charge on or giving *an interest in land*. They are not, therefore, within the first branch of the schedule, but the latter, as coming under the general words, 'all goods and chattels.' They are transmissible to personal representatives. The rates themselves create no charge on, or interest in the houses; still less can an instrument purporting to be an assignment of them do so, and that by way of this sort of bond. It gives the holder no right to distrain or enter, or any means of recovering the money, but by personal proceedings. Bonds, *post obit* and other, are daily the subject-matter of sale, as chattels.

tels. If then these bonds vest no interest in the land, but are merely personal obligations, and are transferrable like exchequer bills, their sale by auction is liable to the higher duty, as being the sale of a chattel.

On the other hand it was contended, that these instruments, although they had been given the name of bonds, were, in fact, no such thing; they are in effect assignments of *a charge on the houses, &c.* in respect of which the rates are assessed. That "all *other* goods and chattels," mentioned in the second member of the schedule, immediately after furniture, fixtures, pictures, &c. must be construed to mean things of somewhat the same nature, and could not be extended to include these bonds; and that if, therefore, they did not come within the first member of the schedule, they were out of the act altogether. It is not the occupier of the house that is rated, it is the house itself. The occupier must pay, it is true, but the house is liable, even while unoccupied. The instrument itself is liable to a stamp-duty, on its being transferred; and that is a reason why there should not be the higher duty imposed on its sale, as is the case with the other acknowledged and favoured cases of a transfer of an interest in lands, &c. And two cases were cited, *Knapp* v. *Williams (g)*, and *Finch* v. *Squires (h)*, which are fully stated and commented on in the delivery of the judgment of the Court by the *Lord Chief Baron*. The whole

(g) 4 Ves. 430. (h) Ib. vol. 10, p. 41.

tending

1816.

The KING v. BATES.

tending to establish,—that the instrument in question was more in nature of an assignable mortgage on the credit of the land, &c. in respect of which the rates were imposed, and out of the produce of which they were ultimately to be discharged; than of a personal chattel recoverable from any person who was responsible, in the character of an obligor, for the satisfaction of them; and therefore the sale by auction of such an instrument, was subject only to the lower duty.

With respect to the cases cited, the Counsel for the Crown endeavoured to distinguish the first of those from the present, by attributing that decision to the object of giving effect to the statutes of mortmain; and that, because tolls, as an hereditament, were expressly within those acts. And as to the other, they submitted, that as there could be no doubt that the poor and county rates (which were the subject of consideration in that case,) were an encumbrance on land, a decision to that effect could not apply to the present question on this particular and anomalous bond.

Cur. adv. vult.

THOMSON, *Chief Baron*, now delivered judgment.—[*Having stated the case.*] It was intended (observed his Lordship) that it should be made a question of law, which of these duties, whether the higher or the lower duty, should be paid by the auctioneer: and certainly he must pay the higher duty unless he can bring himself within that clause which imposes the lower duty on selling any interest

interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or hereditaments. The question therefore will be, looking into these acts of parliament which are referred to, whether that which has been sold, that is this bond, and the assignment of the rate that has been laid upon this property, is an interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or hereditaments; for if it is, then the lower duty is to be paid; if it comes under the description of other property in general, then the higher duty is to be paid.

The first and principal of the acts of parliament which are mentioned in the case, is the 35 *Geo.* III. cap. 73*. That act repeals the former acts of parliament, which were made, (among other things,) for the paving of this parish of *Mary-le-bone*, and for the further and better provision for the relief of the poor. Then there is a clause, which enables the commissioners to make rates, (sect. 179,) enacting, that they are to make rates (for a variety of purposes, the poor rate, the highway rate, the water rate, and a rate for paving, repairing, and cleansing the streets; describing how much that assessment shall be, under the different circumstances,) "upon all and every person or persons "who do or shall inhabit, hold, use, occupy, pos- "sess or enjoy any land, ground, house, shop, "warehouse, coach-house, stables, cellar, vault, "tenement, hereditament, or other building, within

* These acts are not printed.

1816.

The KING v. BATES.

"the said parish or limits aforesaid, according to "the yearly rent or value thereof;" which rates, so to be made and assessed by virtue of that act, shall be entered in a book or books to be provided for that purpose," and so on. That rate, therefore, is to be made on all persons who shall inhabit or hold property within the parish.

The 187th section,—reciting, that there are many houses, buildings, and so on, within these limits, which are taken on leases for years or otherwise, and by the lessees or tenants, and also by landlords or owners thereof, are let out in parts, or separate apartments, to under-tenants, and other houses and premises are let ready-furnished,—enacts, "that the several lessors, lessees, landlords, owners or proprietors of all such houses, buildings," &c. "so let, or which shall hereafter be let, shall respectively be deemed and taken as the occupier thereof, and shall be liable and subject to the payment of the rates or assessments directed by this act to be made, &c." Then the next clause enacts, "that the tenant of each separate apartment shall be liable, and that the respective occupiers who shall pay such rates shall deduct the same in paying their landlords their rent."

Then comes a clause, which I think appears to be very material upon the present case. The former fix *persons*, in respect of their occupation of the premises: this seems to go farther. By the 192d section it is enacted, "That where any of the lands, houses," &c. "shall, at the time of making any of the said rates or assessments, be empty, untenanted

untenanted or unoccupied, then, and in every such case, it shall be lawful for the vestrymen to rate and assess such premises respectively at one-half of such rates or assessments, during the time only that such premises shall be empty, untenanted or unoccupied; and in case the premises shall become after such rate or assessment, empty, untenanted or unoccupied, one-half only of such rate or assessment *shall be charged on such premises respectively* during so long a time as the same shall continue empty, &c.; and then, that in any of the said cases, "the said rate or rates, assessment or assessments, and all arrears due thereon, shall be paid by the owner or owners, proprietor or proprietors, lessee or lessees, or by the first or any other tenant, or the occupier thereof."—So that in such cases the premises themselves, in the event of their being unlet, are to be charged, and the succeeding tenant is to pay that charge so laid upon the premises; in which last case such tenant shall be allowed to deduct it out of his rent.

There are further provisions relating to public buildings, vacant spaces of ground, and dead walls; and as to these, if there is no person subject in respect of their occupation, for the same, they are to be assessed at a rate not exceeding sixpence a square yard of the pavement paved or repaired under the direction of the vestrymen, and situate in any square, street or place belonging to such public buildings, (parish churches, parochial or other chapels, meeting-houses, &c.;) and then this rate or assessment to be made and paid for such parish churches, churchyards, and

1816

The KING v. BATES.

parochial chapels, shall be paid by the churchwardens, out of any monies payable to and received by the churchwardens or chapelwardens, either for seats in the church or chapels, or for burial fees; and the rate or assessment to be made and paid for any other chapel or meeting-house, school, market, warehouse, dead wall or void space, shall be paid by the respective owner or owners, proprietor or proprietors thereof;—and shall be charged and chargeable upon the premises, and be recovered and applied in such manner as other rates and assessments are directed to be recovered and applied by this act."

In the same way, in section 194, unfinished houses are to be charged with the rate, "and if the owner shall refuse the same, they shall be levied on the goods and chattels of the person so required to pay the same, in manner thereinafter directed; and in case the owner shall not be known, or cannot be found, or shall be under commission of bankruptcy, then the rate or assessment made thereon shall be charged and chargeable on the premises, until the owner, proprietor, or lessee can be found;" (*making it a charge upon the premises*, with which some *person* shall thereafter be affected; but the *premises* are to be charged;)—"or until assignees, in case of bankruptcy, are appointed: when the same, and all arrears due thereon, shall be levied on the goods and chattels of such owner or owners, proprietor or proprietors, lessee or lessees, or upon the goods and chattels of such bankrupt, in the possession or custody of such assignee or assignees, who

is

1816.

The KING v. BATES.

is and are hereby made liable to pay the same out of the goods and chattels of such bankrupt or bankrupts, or upon the said premises, in like manner as other rates made by virtue of this act are made recoverable."

Then there is a clause (195) which is somewhat analagous to the payment of the landlord's rent, under the statute of *Anne*, That when any goods are taken in execution by any sheriff or other officer, before such rate or rates, assessment or assessments, shall have been paid, then the sheriff, upon demand made by the collector or collectors for the time being to the said vestrymen, shall and he is thereby directed and required, to pay such collector or collectors such rate or rates, assessment or assessments, so made as aforesaid, and which shall not have been paid by such person, and all arrears due thereon: but so as not to charge the sheriff with the payment of more than one year's rate. And in the next section it is enacted, that in case the owners, occupiers, and so on, of any land, ground, house, shop, &c. refuse or neglect to pay the rate, it is to be recovered by distress and sale of the goods of the party neglecting or refusing, which shall be found either in the county of *Middlesex*, or city and liberty of *Westminster*, or any other county, city or liberty; such warrant being first backed or countersigned by some magistrate for the county, city or liberty where the distress is to be made, the goods are to be appraised and sold.

1816.

The KING v. BATES.

Then it is provided, (sec. 199,) that it shall be lawful for the vestrymen, and they are empowered to borrow and take up at interest, according to the regulations and restrictions thereinafter mentioned, such sum and sums of money as any person or persons is or are willing to lend and advance upon the credit of any of the rates or assessments; and by any writing upon vellum or parchment, signed by the vestrymen, to assign such rate or assessment, upon the credit of which any money shall be advanced and lent, to any person or persons who shall advance and lend such money thereon, as a security for the several sums so borrowed, with interest, which interest shall be payable and paid half-yearly by the treasurer.

I am not aware that there is any thing more in this act of parliament, which calls for particular observation. The subsequent act of parliament makes no material alteration in the provisions of it. The bonds are to be given to the treasurer, and he may put them up and sell them by auction. That has now been done; therefore the question is, what duty the auctioneer has incurred by this sale? and that depends on the question, whether there is an interest in any land created by these bonds. Certainly, in the first place, the assessment is laid upon the person of the occupier of the land; but it is in respect of that land which he so occupies, and of his occupation. In the case of a vacant possession, it is expressly provided, that the assessment shall be made upon the land itself; and so in the case of dead walls, and other places that are mentioned,

1816.

The KING v. BATES.

tioned, which are to be assessed, and when there comes any occupier he is to pay the rate. In the case of a vacant possession, and in the case of churchyards and dead walls, they are to be paid by the parish in the way that has been mentioned. The mode of levying against the person liable to pay who makes default, appears to be by distress, and that distress is a pretty ample one; for it is not confined to goods and chattels within the place within which the duty has accrued, but it is extended to any county, upon the backing of the warrant by a magistrate having jurisdiction there. And here I would state, while it occurs to me, that the provision for the poor's rate is directed by the first statute, (the statute of *Elizabeth*,) to be levied in that way, by distress; but the statute of the 17 *Geo.* II. has provided in the same way as this has done, that if it cannot be levied in the place where it is due, it may be levied any where else, by the same sort of endorsement of the warrant: so that the mode of recovering the poor's rate, and the mode of recovering this rate, appears to be pretty nearly the same.

Then the question which arises is, whether this which has been put up to be sold is not an interest in land? that is, whether such an interest as the assignment of these rates creates—(which arises, in one case, in respect of the occupation of land: and in the other, in the case of vacant possession of land, in which latter the land and premises so vacant are assessed, and the person afterwards occupying them is liable;)—can be said to be other than *a degree of interest in land*: for if it be any interest

1816.

The KING v. BATES.

whatever in land, then it is subject to the lowest duty that is imposed, which would be the seven-pence.

There seems to me to have been a good deal of light thrown upon this subject by the arguments, and especially by the last which we heard. The second argument assisted us much, by comparing this case to some others, under what may be called similar circumstances, in which it has been decided that dues of different descriptions, as tolls and poor-rates, and money borrowed on the security of poor-rates, are an interest in land; and so much so, that where a thing of such a description has been devised to a charitable use, it has been held to be within the statutes of mortmain, which it could not be, unless it were an interest in land. Bonds given by parishes to charge the poor's rates, and bonds for building a county gaol, payable out of the rates, have both of them been decided in the Courts of Equity to be such an interest as cannot be devised for charitable purposes.

The first case was that of *Knapp* v. *Williams*, in a note to *Corbyn* v. *French*, in 4 Vesey, 430, which appears to me to be a very strong decision; and that is afterwards followed up by another. The defendants in that case were governors of a charity for the relief of the poor widows and children of clergymen, and they claimed a mortgage for 500 *l.* upon the tolls arising under acts of parliament, (3 *Geo.* I, 10 *Geo.* I, cap. 6, 11 *Geo.* II, cap. 6,) for the repair of the *Brentford* turnpike road: the security was taken upon the tolls simply, not including the toll-houses and gates; so that, in fact, there was no tangible

1816.

The KING v. BATES.

tangible property there. The question—whether that was within the statute 9 *Geo.* II. cap. 26, came on, upon exceptions to the Master's report. That point was said to have been decided in the case of *Buckeridge* v. *Ingram*, (2 Ves. 652,) where shares in the navigation of the river *Avon* were held to be real estate, and subject to dower; but that case does not seem to apply to this question, for it merely decided those shares to be real estate, just as the New River shares were. The Lord Chancellor said, "It occurred to me, that it had been determined that a mortgage of turnpike tolls is within the statute. The mortgagee would have a right to come into this Court to have an account, and a receiver appointed; he would have a right, by the aid of the Court, to have the tolls specifically applied to his mortgage. Consider what the point of law is from the nature of the interest; it is not at all within the mischief: but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the act, these tolls granted in perpetuity are certainly a hereditament; it is in its nature an interest affecting land; he might bring an assize for these tolls, I should think. There is another species of tolls which gives no right at all in the land, that is, a toll thorough. I think it falls within the general words of the statute."

Afterwards, in *House* v. *Chapman*, p. 542 of the same book, it was decided, "that the bequest for the improvement of the city of *Bath* was a charitable bequest, and that the mortgages, the five bonds

1816.

The KING v. BATES.

bonds of the commissioners for the improvement of the city, and the four bonds of the commissioners of the turnpike, did not pass thereby, but were undisposed of by the will, and belonged to the next of kin of the testator." That was the effect of that case, so determined.

There was a strong case too cited, (*Finch* v. *Squire*,) which is in 10 *Vesey*, p. 41, where money secured by assignment of the poor rates and county rates, was held to be within the statute 9 *Geo.* II. cap. 36, and therefore could not pass under a bequest to a charity. The Master of the Rolls said in that case,—"So all that is paid in respect of the land is got from the land, as much as rent arises out of the land itself. It is more properly to be said to arise out of the land, because it is more in respect of the occupation, than the tolls for the mere privilege of passing. As to that part of the poor-rates that is raised out of the personal property, it cannot be distinguished. I cannot divide and apportion the security, that so much is to be imputed to the produce of the land, and so much is from personal property. I must take the whole; they are so blended that it is impossible to distinguish them. If the consequence of their holding this security would be that something real would go to the charity, it must fail altogether." That, therefore, was certainly considering those bonds for the payment of money chargeable on the poor's rate, to be an interest in land, as much as a rent arising out of the land itself. His Honour was therefore clearly of opinion, that so much as was charged

to

to the poor's rates in respect of the occupation of land, was an interest in land, within the meaning of the Mortmain Act, and therefore could not pass.

I cannot distinguish the present case from those that have been alluded to; they have been decided by very high authority, and I think it would be extremely wrong to suggest any doubt of the propriety of their decision. They appear to me entirely to govern this case, independently of the construction which, without them, possibly might still have been put upon these clauses in the act of parliament, which has so charged real property with the liability to this payment; (although the person who is to answer it is to be compelled to pay, in the first instance, by personal distress,) inasmuch as it is in respect of the occupation of that real property that he stands so charged. It appears therefore to be an interest in land. According to those cases, these bonds would not have passed by a devise in mortmain; the consequence is, that being an interest in land, the whole that could be demanded upon the sale of these bonds is the lower duty, which is the seven-pence. And that is the opinion of the Court.

Judgment for the Defendant.

The

1817.
Tuesday, 14th January.

The ATTORNEY GENERAL *v.* BRANDON.

The scenes of the theatres, and all other canvas so painted, are liable to the duties of excise as painted linen.

Canvas is linen, within the statutes.

But where the canvas has been previously primed, it is not liable to any further duty for being afterwards painted,

THIS was a motion for a rule (a verdict having been given for the Crown, on an information filed against the defendant for the recovery of duties, to the payment of which he was charged to have become liable under the statutes 10 *Anne*, c. 19, 24 *Geo.* III. c. 41, 25 *Geo.* III. c. 72, 43 *Geo.* III. c. 69, imposing a duty on "linen, printed, painted, stained, or dyed," in respect of scenery painted by him for the use of the theatre,)—calling on the Attorney General to show cause why that verdict should not be set aside and entered for the defendant, on certain points of objection made at the trial, and reserved by the *Lord Chief Baron*.

[1815. *Friday, 10th November.*] the primer having paid a duty in the first instance, in respect of the colour necessarily laid on in that preparatory operation.

Holt obtained the rule, on two grounds, 1st, that the statutes imposing the duty on painted linen had not included *canvas*, which is made not of flax but of hemp; 2dly, that if they did, the defendant, who was not a *manufacturer* of such things as *goods*, *wares*, and *merchandise*, was not within the words, intention, or policy of those statutes. He submitted to the Court;—that the leading term *printing*, employed in the acts, controlling all the subsequent words, was sufficiently explicit of the object of the legislature, in subjecting such things to duty, merely as an article of *trade* and *commerce*;—and that it had not been the intention of the legislature to impose any such duty on the mere productions of a painter,—a person exercising a fine art, at all times fostered by national

national encouragement:—but that it was to be restricted to the produce of machinery, or to that wholesale and facile production of slight manual operation, which was nearly allied to it, and would satisfy the words used in the Act, following the generic term printing.

1817.
ATTORNEY GENERAL v. BRANDON.

It appeared from the report to be in evidence,—that the canvas, on which the scenery, as well as all paintings in oil were executed, was first primed before the artist could use it; that is, that it was previously prepared by laying on, a whitish body of paint, which fitted it to receive the colours;—that there were persons whose business it was to perform that operation as a trade, and who took out an annual license and paid the duty,—but that in the present case that was done by the painter himself. And it was also proved, that the extensive manufacture of the article of floor-cloth, was subject to, and paid a duty, in the same manner.

1816.
21st May.

The *Solicitor General*, *Dauncey*, *Clarke*, and *Walton*, now showed cause. They met the first objection by showing,—that in other acts of parliament, canvas was spoken of and considered as linen, particularly the 43 *Geo.* III. c. 68, in the schedule of which, canvas of various denominations is classed under the head "*linen.*"

As to the general liability of painters on canvas to the excise duty, they instanced the usage with respect to the manufactures of floor-cloth, which (they submitted) was in substance precisely the same thing;

1817.

ATTORNEY GENERAL v. BRANDON.

thing; and that as there was no exception in any one of the acts, in favour of this species of painting, the duty was therefore chargeable;—that the inconvenience adverted to, in the case of artists and others, was easily obviated, by the accommodation of procuring the canvas ready primed, on which a duty having been received, none was payable; but that if they did not choose to do so, they were liable to the duty, and must pay it. They then went into all the statutes on the subject, and contended, that it was clear, both from their object and language, that the duty was payable for the article which had given rise to the present proceeding; and that if it should be held to be really exempt from duty, so must be also floor-cloth, which had been constantly charged, and which could then no longer be demanded.

Pell, Serj^t^, *Holt*, and *Lamb*, endeavoured to support the rule; contending, in addition to the arguments used on obtaining the rule,—that it could not have been the intention of the legislature to impose a duty on this species of painting in oil:—that for more than 100 years since the first act on the subject passed, no duty had ever been demanded for such articles as were the object of this information; but that the statutes had in view merely linen, properly so called, which had received additional beauty and value from the well-known process of being figured and coloured by the public manufacturer as an article for sale in the market, and exciseable as such:—that printing was the *nomen generalissimum*, and the following words were used, *ex abundanti cautela*, and to prevent evasion.

They

1817.

ATTORNEY GENERAL v. BRANDON.

They then proceeded to show, from various sections and clauses of the several acts, particularly of the 25 *Geo.* III. c. 72, that they became absurd or futile, when attempted to be applied to the article in question. Was it to be imagined, for instance, that the painters of the Royal Academy were to enter their rooms and give notice to the Excise, which some of the provisions required of painters of linen, before they could begin a picture? for as to their purchasing their canvas ready primed (although it was not admitted that that would absolve the painter from further duty, if the arguments of the Crown were right,) painters set too much value on their labours to entrust to another so essential an operation as the *substratum* of their productions, which might be destroyed by a defect in that particular. But it is on the painter of the linen that the duty is imposed, not on the primer; or if on the primer in respect of what he does to it, the painter would also be liable. It was also among those provisions, that the linen should, before it was painted, be measured and marked at both ends, and a penalty is imposed on defacing such marks; and several other requisitions were adverted to with the same object. Those provisions (they submitted) could not have been intended to apply to a painting; or no one could, in future, paint a landscape on paper, if the construction contended for by the Crown were right, without being liable to a duty.

As to floor-cloth, that, they submitted, was chargeable as a manufactured article of extensive commercial importance, and produced by machinery which

1817.

ATTORNEY GENERAL v. BRANDON.

which stamped it with blocks; and that assisted the distinction taken in favour of the defendant.

In schedule F. foreign pictures are charged with a duty, *eo nomine*; and it would be absurd to say that pictures painted in oil on canvas, come under any classification of painted linens. The object of the acts could only apply to *linens as such, and meant to be afterwards used as such*, and to be applied to the purposes to which linen is usually applicable, as dresses, furniture, &c. And one of the terms used in these acts, by way of description of the article, is *piece goods*; but they could never have had in contemplation this sort of operation on it, which, when performed, totally destroyed its quality as linen, and left no vestige of that article apparent. In an indictment for stealing a picture, a description of it by the term 'painted linen,' would be insufficient to support such a charge.

The *Solicitor General*, in reply, urged—that as all the terms used in the act, printing, painting, staining, and dying, were entirely distinct in themselves, and were performed by distinct modes and processes, it was obvious that each was intended to be distinctly charged with the duty, and they could not, therefore, be considered only as different modifications of the same operation;—that linen had been clearly shown to be a term which would include canvas,—and there was no doubt that the canvas in this case was painted. Then the sole question would be, whether it came within the statutes imposing a duty on linen painted? With respect to all

1817.

ATTORNEY GENERAL v. BRANDON.

all arguments *ab inconvenienti*, the inconveniences must be taken to be balanced by the conveniences; but that, in all events, the only inquiry at present was, whether the duty attached.

THOMSON, *Chief Baron*, now gave judgment. This was an information for duties, which the defendant was supposed to owe to the Crown, in respect of having painted certain linens. The duty was first imposed by the statute of the 10th of Queen *Anne*, and has been continued by a variety of acts of parliament, with different modifications and additional provisions, down to the present time. It is imposed on calicoes and linens printed, painted, stained or dyed. The article in question consisted of canvas, which it seems is (strictly speaking) made of hemp, and not of flax; and it was for a while contended, that an article of that description, the fabric of which is canvas, does not fall within the description of linen. But, however, we never entertained a doubt on that subject; (and I believe the counsel for the defendants were themselves, in fact, satisfied of that at last, and appeared to give up that point;) because, in the language of many acts of parliament, canvas itself is denominated linen, and is put under the head of linen in various instances.

That being so, it comes to the question, whether, under the circumstances of this case, this duty must be held to attach? Mr. *Brandon*, it seems, is variously employed about the theatre of *Covent Garden*; and, amongst other things, he was em-

1817.

ATTORNEY GENERAL v. BRANDON.

ployed in making the scenery, and in painting himself the scenery for the use of that house, in doing which, he makes use of canvas, (which is the article in question,) and upon which his scenery is delineated; and the way in which that is done, is most certainly by painting it. The word painted, is found in connection with other words, namely, printing, staining and dying, which refer to other modes of ornamenting linen besides that of painting it; but it really results to the question, whether these scenes are not painted linen within this statute, for whatever purpose it may be afterwards applied?

It was in evidence, that there are certain persons whose business it is to do the first thing to the canvas, preparatory to its being painted on, and receiving what may be called a picture; the denomination of that previous operation is priming, which will be found explained in any of the dictionaries of arts and sciences. I looked particularly into Chambers's, and it is there explained to be that process by which the first colour is put upon the canvas. It is necessary that that should be done with linen, before any oil paint can be laid on it; for, otherwise, it would all run through, and never form a picture: and to prevent that, it is that they use this basis called priming. But it is, of itself, painting; it is paint put on the canvas, and necessarily so put on it. The scenery appears here to have been part of it cut out in different shapes,—frequently in the shape of trees; but that makes no difference in the consideration of this question, of—whether it is linen, and liable to duty when painted on.

It

1817.

ATTORNEY GENERAL v. BRANDON.

It was in evidence, that the persons whose employment it is so to paint (prime) this linen, and prepare it for the painters, regularly pay a duty, as is required by the act of parliament to be paid by painters, stainers and dyers of linen. In point of fact, they take out an annual license for so doing: and those articles, when so painted on, receive an impression, importing that it is charged with duty; and that is the way they have always gone on down to the present time. It does not appear that any painter of pictures has been thought of, in order to have the duty demanded of him: but if he does that, which if done by another person would subject the article to a charge of the duty, there is no reason why he should be exempt. It has been always, in fact, paid by the primers; and the officers gave evidence, that they enter their rooms in which these things are done. That was not required in the present instance; and it was stated that it was merely meant to try the question, whether they are liable to pay the duty?

The matter lies in a small compass; and I do not know whether it will be made clearer, by endeavouring more to amplify it. These scenes are, in fact, linen painted; and therefore incur the duty, as being one of the articles enumerated in the statutes. Nor is that, after all, more than has been constantly done with regard to floor-cloths, which regularly pay a duty under the same act, and for the same reasons. They are commonly in use; and it is perfectly well known they pay the duty: but that is in no other respect, than as being linen

1817.

ATTORNEY GENERAL v. BRANDON.

painted. Many of them have figures on them, done with stamps and blocks, which may be denominated printing; but with regard to painting, the mere daubing them with a single colour would answer the description, and when so daubed, they must pay a duty as painted linen; and having done so, they receive an impression as the act directs, denoting that the duty has been charged. On the whole, we are of opinion, that the duty demanded by this information has been proved to have been incurred; and, therefore, the judgment must be for the Crown.

Judgment for the Crown.

[Same Day.]

The ATTORNEY GENERAL v. JONES & BARTLETT.

If a man give, by deed, his leasehold and personal property to trustees, for the use of himself for life, and of several persons therein named at his death, with a power of revocation reserved,—never having parted with the deed or with any part of the property during his life,—and confirming, in most respects, such disposition of it by will at his death; those two instruments will be considered as to be taken and construed together as testamentary instruments, and the property passing under them will pass as legacies, and be subject to duty.—WOOD, *B. dissentiente.*

THIS was an information filed for the recovery of the sum of 800*l.* for legacy duties, under the 48 *Geo.* III. ch. 149; charged to be payable on a legacy of 8,000*l.* bequeathed to *Ellen Franklin*, a stranger in blood to the testator. A verdict was taken for the Crown on the trial, subject to the opinion of the Court on the following facts, found by a special verdict.

"By a certain indenture, bearing date the 25th day of *March*, in the year of our Lord 1813, and made between *William Franklin*, esq. of the one part,

and

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

and the said *Thomas Jones* and *Patrick Bartlett*, the present defendants, of the other part, it was witnessed, that in consideration of 10*s.* to him paid, he the said *William Franklin* did bargain, sell, assign, transfer and set over unto the defendants, their executors, administrators and assigns, all that messuage or tenement of him the said *William Franklin*, situate in *Norton-street*, in which he then resided, with the garden and appurtenances, to hold the said messuage or tenement, with the appurtenances, unto the defendants, their executors, administrators and assigns, for the residue of the term he had therein, upon the trusts, and to and for the ends, intents and purposes, and subject to the provisoes thereinafter declared concerning the same; and for the considerations of the said *William Franklin*, did bargain, sell, assign, transfer and set over unto the defendants, their executors, administrators, and assigns, all the 7,500*l.* government stock, in the five *per cent.* annuities, and all other stocks or funds standing in the name of the said *William Franklin*, or belonging to him, in the books of the governor and company of the Bank of *England*, and also all the dividends which might be due thereon at the time of his decease, and all arrears of any pension or pensions which might be then due to the said *William Franklin*, payable to him by the Government of *Great Britain* or otherwise, and all books, plate, household furniture, linen, china, glass, and pictures, and all other personal estate whatsoever then belonging to him the said *William Franklin*, or which should belong to him at the time of his decease, to hold unto the

1817.

ATTORNEY GENERAL. v. JONES and BARTLETT.

defendants, and the survivor of them, his executors, administrators, and assigns; nevertheless, upon the trusts, and subject to the proviso or provisoes, and for the intent and purposes thereinafter expressed and declared of and concerning the same; and it was thereby declared, by and between the said parties to the said indenture, that the said defendants, and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of all the before-mentioned leasehold premises, and the said 7,500*l.* five *per cent.* annuities, and all the other stocks or funds in the name or on the account of the said *William Franklin*, in the books of the governor and company of the Bank of *England*, and also of all the other personal estate whatsoever of the said *William Franklin*, upon the trusts thereinafter declared concerning the same; (that is to say,) upon trust for the use, benefit, and advantage of the said *William Franklin*, for and during the term of his natural life; and from and immediately after his decease, upon trust, that the defendants, and the survivor of them, should receive the rent and proceeds of the said messuage or tenement, and premises, and the interest, dividends, and profits of the said stocks or funds, and apply the same, or so much thereof as they in their discretion should think necessary, for the maintenance and education of *Helena*, commonly called *Ellen Franklin*, who was born on or about the 7th day of *April*, in the year of our Lord 1798, until she should have attained the age of 21 years, or be married, with the consent in writing of the defendants, or one of them; and from and immediately

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

immediately after the said *Helena*, otherwise *Ellen Franklin*, should attain her said age of 21 years, or be married as aforesaid, then upon trust, that they the defendants, and the survivor of them, should assign the said leasehold premises, and transfer the said stocks and funds, unto her the said *Helena*, otherwise *Ellen Franklin*, or stand possessed thereof, and of the said books, plate, household furniture, linen, china, glass and pictures, and all other the personal estate of the said *William Franklin*, of what nature or kind soever, or wheresoever, in trust, for her the said *Helena*, otherwise *Ellen Franklin*, her executors, administrators and assigns, for her and their own use and benefit; and upon further trust, that the said defendants, and the survivor of them, and the executors, administrators and assigns of such survivor, should from time to time lay out and invest the surplus of the interest, dividends, or produce, arising from the messuage and respective funds aforesaid, and from the residue of the said personal estate of the said *William Franklin*, after applying a sufficient part for the maintenance, education, and support of the said *Helena*, otherwise *Ellen Franklin*, as aforesaid, on government or real security, to accumulate for the benefit of the said *Helena*, otherwise *Ellen Franklin*; such accumulations to be liable to the like contingencies, and as was before directed respecting the said messuage, stocks, funds or premises, out of which the said accumulations would arise. And the said indenture contained a proviso, that it should be lawful for the said *William Franklin*, at any time or times during his life, by any deed or writ-

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

ing under his hand and seal, or by his last will and testament in writing, or by any codicil or codicils to such will, to be duly executed, to revoke or make void, alter or change, all or any of the respective trust or trusts in and by the said indenture limited or appointed of the said messuage or tenement, with the appurtenances, stocks or funds, dividends, arrears of pension, books, plate, household furniture, linen, china, glass, and pictures, and all other personal estate whatsoever, so assigned by the said *William Franklin* as aforesaid. And the said indenture contained powers for the said defendants to appoint other trustees, in case they should refuse or decline to act, and to reimburse themselves their expenses; and also a clause of indemnity against such other acts. After the execution of the above-mentioned indenture, the said *William Franklin*, by his will, bearing date the 15th day of *April*, in the year of our Lord 1813, and duly executed, reciting the before-mentioned indenture, and the power therein contained for revoking or altering the same, did, by his said will, confirm the said deed in all respects, except where the same was altered by that his will; and he thereby directed that his funeral expenses, the expense of proving his will, and all his just debts, should be defrayed and paid out of the money which should belong to him, and be in his possession, in his dwelling-house, or in the hands of his banker, or the dividends due from the public funds, or the arrears of his pension or allowance from government, at the time of his decease; but in case such money should not prove sufficient for the said purposes, then his executors were

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

were to discharge the same by sale or transfer of three *per cent.* consols. or three *per cent.* reduced, belonging to him in the public funds, or such parts thereof as might be necessary for the before-named purposes, and for discharging the legacies thereafter by him bequeathed. The said *William Franklin* did then, by his said will, give several legacies in stock and money, to the amount of some hundred pounds, and appointed the defendants his executors, with the usual powers and indemnities. The said *William Franklin* died on or about the 18th day of *November* 1813, without altering or revoking his said will; and the said defendants proved the said will of the said *William Franklin*, in the Prerogative Court of the Archbishop of *Canterbury*, on the 15th *April* 1814, and have taken upon themselves the burthen of the execution thereof. At the time of the death of the said *William Franklin*, the said leasehold messuage or tenement, with the appurtenances, in the said indenture and will mentioned, remained in the possession of the said *William Franklin*, together with all the books, plate, household furniture, china, glass, pictures, and effects, mentioned and comprised in the said indenture; and the sum of 7,400 *l.* five *per cent.* annuities, stated in the said indenture to be 7,500 *l.* were, at the time of the death of the said *William Franklin*, standing in the name of him the said *William Franklin*, in the books of the Governor and Company of the Bank of *England*, and had not been, nor were at the time of the death of the said *William Franklin*, transferred to the said defendants, the trustees named in the said indenture,

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

ture, or either of them; but the said *William Franklin* received the half-yearly dividends accruing due thereon during his life, and retained the entire possession, management, and control over the said leasehold premises, and all other the property in the said deed mentioned, and also the custody thereof, from its execution until the time of his death. The clear residue of the personal estate and effects of the said *William Franklin*, after payment of all his debts, funeral and testamentary expenses, and pecuniary legacies, amounts to the sum of 8,000*l.* which the said defendants have retained for the benefit of the said *Helena*, otherwise called *Ellen Franklin*; and the legacy-duty, if any is payable thereon to his said Majesty, amounts to the sum of 800*l.* the said *Helena*, otherwise *Ellen Franklin*, named in the said indenture, and for whose benefit the same is so retained, being a stranger in blood to the said *William Franklin*.

This case was twice argued:—first by

Nolan, for the Crown, and

The *Common Serjeant*, for the defendant;—and afterwards, by

Dauncey, for the Crown, and

Scarlett, contrà.

On the part of the Crown, it was argued, that this mode of transferring the property in question, was intended

intended to operate as a mere device for evading the legacy duty, but that these instruments were within the legacy acts, (particularly the 36 *Geo.* III. ch. 52, sec. 7*, from the language of which the principal arguments were taken,) which had reached them by the words "testamentary instrument" being superadded therein to the word "will;" obviously with a view to meet this kind of instrument;—that such a deed being purely voluntary and without consideration, and revocable at will, would be wholly void, as against creditors. The testator had neither parted with the possession or control of the property till his death; and, at his death, he had a power of disposing of the whole in the words of the act: nor can these defendants now dispose of this property, otherwise than as executors. There was not even an *inchoate* right in the grantee, till the testator's death. And this is a much stronger case than that of a donation *causâ*

* And be it further enacted, That any gift by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall effect as a donation *mortis causa* shall also be deemed a legacy within the intent and meaning of this act.

mortis,

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

mortis, made in a last illness, in expectation of death; which would revert, or rather, not take effect, if the donor should recover: yet that is within the statute, although it does not vest by will.

For the defendants, it was contended, that the instrument in question was not a will;—and that the law of *England* knows no such thing as a testamentary instrument, and that those words in the section was meant to apply to *Scotch* wills, which are called by that name. If no will had been made, the administrator could have had no right to the leasehold property disposed of under this deed; and the act of parliament was not intended to alter the effect of any adopted mode of conveyance in use.

As to the question of fraud, besides that it was not found by the case, there was really no such thing in the transaction. A man has a right to avoid a duty, but not to evade it. He may pay money in the presence of a third person, for the sake of saving the duty on receipts, and there was many other cases of the same sort.

Suppose this will had not been signed, as required by the statute, still this property would have passed by the deed, and the trustees might have maintained an ejectment against the heir; and it cannot be considered a will for some purposes, and a deed for others. If this deed contained no power of revocation, there could be no doubt of its being good; for all the property would have passed by it, and the

grantor

grantor could not have altered its limitations by will. But the power of revocation does not destroy the nature and effect of the deed; there are many such known to conveyancers, wherein there is both a power of revocation and a suspension of its taking effect. It becomes irrevocable by the death of the party in whom that power is placed. Such, for instance, would be the case of a settlement, on the marriage of two persons, of an estate on themselves for life, with remainder to children, in the usual manner; if, by that deed, there was a power reserved to the survivor, to revoke the uses and alter the disposition of the limitations to the children, during the life of such survivor. Now, such a person would have a power of revocation during his life, and might alter the prior disposition of the property by his will; but it would not be, on that account, less a deed, and would take effect as a deed after his decease. Unless the testator or grantor had in his lifetime revoked the assignment of the leasehold property executed by this deed, by another deed, it must have passed to the grantee; nor, if he had died without a will, could the next of kin have claimed it against the grantee. The power of revocation, therefore, can, in effect, make no difference, till it is executed; and, if he had died without exercising it, the trustees need not have proved this deed as if it were a will. If he had been dispossessed of his house, in his lifetime, an ejectment could not have been brought (existing this deed) but in the name of the trustees.

As to there having been no actual transfer of the stock to trustees, that could make no difference in this

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

this case, as long as it was not otherwise transferred; and he dying without so transferring it, it must go to them.

[It was admitted that this instrument would have been void, as against all persons having legal claims; and that property acquired after the execution of the deed, would not pass by it.]

Then, as to the household furniture, plate, linen, &c. being limited over, Courts of Equity have been liberal in giving effect to such limitations, where the personals have been such as would improve the value of a house or other property, to accompany the transfer of which, such personals have been conveyed: but if that latter species of property be incapable of any such limitation, still that would not destroy the operation of this deed, as a deed, on that property on which it might from its nature operate.

In the replies, it was admitted that a man might dispose of his property in his life-time as he pleased, without its being liable to any duty; but it was urged, that in this case the property had not been in fact disposed of till the death of the party, and that then it came within the words and description of a legacy, "given out of such personal estate as the per-"son dying had power to dispose of at his death." As to the case of a settlement, with power to make an appointment by will, that is expressly excepted out of the act, by the 45 *Geo.* III. ch. 28, sec. 4; and that exception is a legislative declaration, that such

such an appointment would otherwise have been liable to the duty: and this is certainly a much stronger case. The whole case was ultimately put as one of mere construction of the terms and object of these acts of parliament.

Cur. adv. vult.

The COURT, this day, delivered their opinions *seriatim.*

RICHARDS, *Baron.*—[*having read the case.*]—Now the question seems to me to be, whether this deed of the 25th of *March* 1813 be to be considered as a will, or other testamentary instrument, of Mr. *Franklin*? As to the other paper stated in the verdict, that is beyond all doubt a will, and in the regular form of a will. These two instruments are now brought before the Court; and the inquiry will also be extended,—if there should be any doubt about the first instrument being a testamentary instrument,—to the consideration, whether the two instruments, connected together as they are, are not to be regarded as a testamentary instrument, under which this provision is made in the nature of a legacy, as it is stated. I am of opinion that this deed itself is now to be considered as a testamentary instrument. The Court is driven to the necessity of deciding that point, though it is not usually in the habit of entertaining questions of that kind, the Spiritual Court being the proper *forum* for that purpose; but as it appears in a great number of cases throughout the books, other Courts must sometimes necessarily decide that question, when it comes

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

comes before them, and say whether papers are testamentary or not, which we, who have no power to drive the parties to the Spiritual Court, must decide according to the best of our judgment.

Now this indenture is made without what we may truly call any fair consideration, for it is obviously merely nominal; and the Court is bound to notice the distinction between a real and a nominal consideration. It is a voluntary deed: for the consideration not being valuable, does not make it otherwise. On that subject it is impossible to form any doubt, and therefore it must be taken to be perfectly voluntary. The maker of the deed keeps it in his own possession. It is stated in the verdict, it is true, that the deed was sealed and delivered; but it is clear what the meaning of that is,—that it was sealed and delivered for the purpose, merely, of making it a deed: not delivered to the parties in whose favour, for the benefit of the infant, the deed seems to have been made; for it is stated by the jury, that the grantor had kept the deed in his own possession down to the time of his death: he never transferred the stock, and took no measures to clothe the trustees with any control or authority over it, or to invest them with any part of the property. He received the dividends; he might have sold the stock whenever he should have thought fit. The deed was in his custody: the trustees do not even seem to have known any thing of it, and it appears to have been purely a deed made in effect only between him and himself. He therefore continued, in point of law, as the jury find in point of fact, in complete possession, management, and control,

control of all the property which is mentioned in this instrument; and nothing was to take it from him but his death, if he chose to die without disposing of it in the way in which he had still a right to dispose of it. It was therefore, in all respects, testamentary, so far as the complete possession of it during his life-time, and that possession being to be transferred after his death, goes. It seems to me to be as completely testamentary as if he had made a will to be ambulatory till his death, and then to vest his property in the way intended by this instrument. The instrument is right in point of form, and trustees are interposed; but there is no doubt that the Court is bound to look, not merely to the form of the thing, but the substance. Then is not this an instrument, in point of substance, which reserves to this party the total command and control of the property down to the time of his death; and does it not begin then, and then only, to operate, just as a will would operate? It seems, therefore, to carry with it every mark of being testamentary; and is so in effect, as much as any testament, in my opinion, would have been.

There is a case decided by Sir *John Nicholl*, which may be found in Dr. *Phillimore*'s Reports, just published, which it may be useful to refer to on this question. It is the case of *Thorold* v. *Thorold**, where an instrument, in the form of a deed of gift, was admitted to probate. I do not cite it as an authority entirely in point, but as fixing the principle throughout on which this case should be decided. I will not therefore trouble the Court

* Vol. I. p. 1.

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

with more of that case, but shall only refer to it. There are, besides, many cases where deeds are considered testamentary, and have been acted on accordingly, and probate granted of them when application was made to the Ecclesiastical Court. There is this distinction in the case which I have just cited, that there there were no trustees named; but the learned judge, in his decision, stated, and indeed common sense so dictates, that when you look into transactions of this sort, you must look to the substance, and not the mere form. Now if it is once admitted that, if there were no trustees here, the act would be testamentary, as those cases decide, surely you will not suffer a person to escape the law, and that by his own act, by the formality of introducing trustees who are of no use during his life, while he keeps all the property, and retains the control of it, and the trustees know nothing of it; at least nothing of the sort is found by the verdict.

After this he makes his will, and he incorporates with it this deed, as it seems to me. He refers to the deed in it: he there states, that he has a power to revoke the deed; he confirms it, however, except so far as he revokes it: he alters it, by giving some legacies, and he confirms the rest. If he then gave the legacy anew to this lady, it would have passed under the will. It is ultimately under the terms of the will that he confers a testamentary benefit on her: and therefore it seems to me, that these two instruments may be fairly considered together. But I think the true question arises upon the deed itself. Now I admit, if a will had not been made, the tenor of the deed must have been attended to; and the property must

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

must have gone accordingly; but as it is, it must go in the nature of a testamentary disposition made by Mr. *Franklin*. That being the opinion I had at first entertained, I am, after a good deal of consideration upon the subject, of the same opinion, and think that this paper is to be considered a testamentary paper; or that, in all events, the two together are testamentary; and therefore, that the duty claimed has attached: and I take no shame to myself in confessing that I have altered my former opinion upon the subject*.

WOOD, *Baron*. I am sorry I cannot agree in the opinion already delivered. I think the question is, as has been properly stated, Whether the indenture set out in the verdict can be deemed a will or testamentary instrument, within the meaning of those Acts which impose the duty on legacies? Then we must inquire what is the meaning of 'will or testamentary instrument' there, and why those latter terms are used in this clause of the act. Now it appears to me they have been used for the purpose of including in its provisions any informal instrument which might still be in effect a will; for a will, properly speaking, is not complete, unless there be executors appointed; but yet there may be instruments which do not appoint executors, which may notwithstanding still be considered testamentary instruments. It may also have relation to *Scotland*, where the term 'testamentary instrument' is used instead of will. I agree that there are many irregular instruments which have been deemed testamentary,

* His Lordship, on this case being laid before him when at the bar, had inclined to the contrary opinion.

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

although they have been, in point of form, something like deeds: but I believe there is no instance to be found, where an instrument properly made, in due technical form, and which can take effect as a deed, has been considered as testamentary. I believe the cases on this subject, which have been published in Dr. *Phillimore's* late Reports, are all upon papers which could not operate as deeds. You will find many instances where the instrument has been in the nature of a bill of sale, but there have been no parties to it, wherefore that never could operate as a deed; and therefore, rather than it should have no effect at all, it has been considered a testamentary instrument. But is that the case here? This is the case of a deed regularly and duly executed. It has all the requisites to constitute a deed. It is an indenture, and a will is never an indenture. It is between parties; there is the grantor, or the bargainor, on the one part, and the trustees, or bargainees, on the other part. There is a pecuniary consideration, which is necessary, perhaps, to give it effect, for although it is merely nominal, yet it is so far substantial that it is necessary to give effect to the deed; and it does give effect to it *as* a deed. There are the words 'grant, bargain, sell, transfer, and set over;' those are not words used in a will. Then there is a grant of leasehold property, and it is "to hold for and during the term of the lease." There is a grant afterwards of all the goods, chattels, and personal estate, not only which he has then, but which he shall have at the time of his death. I agree that this deed cannot operate with respect to any thing but that which he was possessed of when he

1817.

ATTORNEY GENERAL, v. JONES and BARTLETT.

he made it; for if he afterwards acquired property, it would not pass: but would that make any difference in the denomination to be put on the instrument itself? Many deeds may operate in one respect, and not in another. This is one of those; but it is a deed, and will have operation as to that which the grantor was possessed of at the time he made the deed.

Then some stress has been laid on this, that one of the trusts is,—that it is given to the trustees for the use of the grantor during the term of his life; and that there is also a proviso of revocation, with a power of appointing new trustees. But all these things make no difference with respect to its being, or not being, a deed: if it had not had that power of revocation, it would have been absolute; but having it, it is equally a deed, only it has a power of revocation, which is an extremely common thing in instruments of this sort.

It is then said, that it must be a will, because, in a subsequent will which the testator makes, he takes notice of it, and confirms it. But can such a confirmation make any difference? Can that alter the nature of it? It gives no additional force to it whatever. And how the confirmation by will of a deed, can convert the deed itself into a will, I cannot conceive.

Now let me suppose that there was no power of revocation; would it not have been a good and valid deed? Would any man contend that that could be a will or testamentary instrument, which is, in point of form and substance, a deed, and which must

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

operate as a deed? It could not be proved in the Ecclesiastical Courts, because it would not be a subject within their jurisdiction. Then let me suppose, that after this deed (there being no power of revocation in it, or to make alterations of the uses of the deed) the party had made a will, disposing of the property differently; that will would not avail against the deed: but the deed, notwithstanding the alteration by will, if he had not reserved the power, would prevail against the will. That shows, pretty clearly, that it is a deed and not a will. If, on the other hand, he had made a will, and then had made another will, the second would have been a revocation of the first will; but here, if he had made a second deed, contrary to the first deed, the first deed would prevail against the second, if he had reserved no power to alter the trusts of the deed by a subsequent instrument.

In this case, there is no doubt that the legal estate passed from him in his life-time. Now is there any case where a legal estate passed by a will in the life-time of the testator? This was a deed which passed the legal interest in the personal chattels which he was then possessed of; it would not pass *choses* in action, in law, but it would pass the leasehold property. There are also pictures, furniture and plate, and the legal interest in those must have passed. If an ejectment were to be brought, to recover the possession of the leasehold premises, it must be in the name of the trustees; for the legal interest was vested in them. It happens in this case that he has appointed his trustees to be his executors; and therefore they have two characters; but, I take it, if they were to bring an ejectment, it must be in the character of trustees, and not

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

not as executors; because the interest is in them in that original character, and they take nothing by the will in the leasehold estate. And if the will had appointed other persons executors, still every thing that passed by the deed must have been recovered in ejectment by the trustees: it is therefore a complete deed, and has nothing in it testamentary.

Then some stress has been laid upon the 7th section of this statute, which has these words in it: "That any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy." That was introduced for the purpose of meeting the kind of case which frequently occurs, where a person may have an absolute power of disposing of property, which cannot be called his personal estate. He may have a power given him to dispose of property which is not his own, by will or deed; and if he has a power to dispose of it as he pleases, it is still his property for that purpose.

Now, it is true, that in this deed or instrument he has reserved to himself a power of altering any of the trusts contained in the deed; and so far as he has done that by his will, he certainly falls within this clause of the act of parliament. The deed most undoubtedly gives him a power of doing it; and so far as he has done it the legacy-duty

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

will attach upon it. I have no doubt upon that. And it is stated by this verdict, "that the said *William Franklin* did then by his will, give several legacies in stock and money to the amount of some hundred pounds, and appointed the said *Thomas Jones* and *Patrick Bartlett* his executors."—Therefore, such legacies as he has given in stock or money, most undoubtedly, I apprehend, will be subject to the legacy-duty: and they will be subject to the legacy-duty under the 7th section of the act, because they are given out of a fund which he had a power to dispose of. But with respect to that which is only affected by the deed itself, I apprehend no such duty can attach.

Now, supposing that, instead of making this new appointment or giving these legacies by will, he had done it by deed; for he may alter the deed by a deed, in his life-time, or by any will to be by him made: suppose he had in his life-time made this alteration,—had done in his life-time by deed, what he has done by his will,—could it be contended that there would be any thing testamentary in that? Yet the whole would then have reference to a deed. Then how does the will make a difference in the deed? It makes this difference merely,—that it operates as a will upon that which he has so disposed of; and therefore the legacies which he has given by it will be liable to the duty.

It was argued that this was a fraud, because it was done with an intent to avoid the legacy-duty. And probably it was done with that view; but that was no fraud, that I know of. There are two ways of

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

of doing it; a man may, by deed in his life-time, dispose of his property, reserving the use of it to himself for life, and after his death direct it to go to his children, or such persons as he may think proper; or he may do the same thing by making a will: but he is not obliged to prefer either mode to the other; he may choose which mode he pleases, the law leaves it to his option. He may say, I will not do it by will, I will do it by deed: I will do it by deed, because I shall only have the stamp to pay for; and not by will, because it will be subject to a large legacy-duty which will attach upon it, and which my legatee will be bound to pay. He has a right to do so; he has a right to make his election. If you can show any law which says, that where there are two ways of doing a thing, the person shall do it in the most beneficial way to the revenue, you will effect something. But there is no law that so fetters any man as to his property; he may dispose of it by deed, confessedly to avoid the legacy-duty, which, if it were done by will, it would be subject to, but that is no fraud. If it is a defect in the law, it must be remedied by the legislature; but we must decide upon the law as it stands. When the tax was laid on hair-powder, the people ceased to wear it. Could you say that that was a fraud, and that therefore they must pay the tax whether they will wear powder or not? It would be monstrous; it goes to such an extent that there would be no end to it. It was no fraud in this testator to take the course most beneficial to himself, though less so to the revenue; it was a matter of prudence in him, but it was no fraud. Therefore I do not think myself warranted in making a forced and strained construction,

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

tion, contrary to the real meaning and import of the words, to extend this act to a disposition of property effected by deed, when the act speaks only of a will or testamentary instrument. As to one part of the claim, I think some portion of the property bequeathed is liable to legacy-duty; but as this is an entire verdict, the judgment ought to be given for the defendant, unless there be a *venire facias* awarded, to ascertain how much of that which he had a power to dispose of is liable to the duty.

GRAHAM, *Baron.* I take it, the short question in this case is, Whether the instrument, which is the subject of this special verdict, is, or is not, a testamentary instrument? I had thought, in the course of the argument, that the clause my learned brother *Wood* has referred to furnished a strong argument in favour of the demand of the Crown, from the manner in which it is penned; but I shall not occupy the time of the Court in observing on the ambiguity of that language, because I concur with my learned brother *Wood*, perfectly, in thinking that the disposition there spoken of out of personal estate over which the party has a disposing power, is confined to a disposition by will or testamentary instrument; and therefore the question recurs to that which I have ventured to state it to be.

Now, therefore, in order to judge whether this is a testamentary instrument, we are obliged to borrow the knowledge on the subject which belongs to another jurisdiction; but where an act uses expressions of this sort, and the Court have no power of directing the parties to resort to the proper jurisdiction,

jurisdiction, it becomes a necessary part of our duty to construe the act as it is framed by the legislature; and we therefore must say whether this is, or is not, a testamentary instrument.

Now, in the first place, without occupying a great deal of the time of the Court, I think the proper way of considering this, is to consider what is a testament,—what is the nature of that instrument which the law calls a testament or will; and then to see the nature of this instrument before us, and what is the operation of both. It is perfectly well known that the Ecclesiastical Courts have taken their ideas on testaments from the civil law; and there is one principle which pervades all the doctrines on the subject. A will is described by the Digest in this way; it is, "*voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit.*" *Blackstone*, in his second Commentary, cap. 32, in explaining these words, describes them to mean—"the legal declaration of a man's intentions, which he wills to be performed after his death. It is called *sententia*," he says, "to denote the circumspection and prudence with which it is supposed to be made; it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention; it is JUSTA *sententia*, that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo quod quis* POST MORTEM SUAM *fieri velit*, because a testament is of no force till after the death of the testator." Thus, therefore, we see that in order to constitute the essence of a will, it must be an instrument which a man voluntarily makes; it is an expression of

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

of his will, and it is an expression of his will touching the disposition of his property at the time of his death, and only at the time of his death. Now when we consider the instrument before us, does it, or does it not fall in, in substance, with this definition of what is a will? I do not want to have recourse to the authority of *Thorold* v. *Thorold* to establish that you are to look to the substance, and not to the form; for no man in preparing such an instrument, by calling it a deed, can give it the effect of a deed, if effectively and substantively it is not so in its operation.

Now, what is the disposition which this gentleman makes on the 25th of *March* 1813? It is immaterial to go into his intention, because I do not found my idea on his intention to avoid the duty; the question is, whether he has done it in this way. He sets about this instrument, to give it that effect which he has, by a formal will, confirmed on a subsequent occasion; and the special verdict states the will to have been signed by him short of a month afterwards. Now what does this instrument do? I most perfectly and entirely agree with my learned brother *Wood*, that if this instrument really did effectively dispose of any part of his property *during his life*, it has the operation of a deed; but I say that any man looking at, and reading this instrument, must be perfectly convinced, not only that he had no intention of parting with his property during his life, but that he has guarded against any possible interruption of his own enjoyment. Then he is in the situation of a man who has made his will. When it is urged that it would

be good without a power of revocation, I agree to it, because that would take away the character of a will: but having a power of revocation, he reserves to himself a power to annihilate it by a slip of paper, to which he may sign his name, and he may do it without a witness. I say, therefore, under these circumstances, he has left himself absolute and complete owner of the estate.

But it is argued,—and that is an argument arising on the face of the instrument,—that he has put the legal estate out of himself, because there are trustees, and he has assigned it to them; and he certainly has nominally assigned 7,500*l.* stock to them. He has assigned it in one sense, but has he effectively done it? So little has he done it, he had not transferred the stock; he had not acquainted the trustees that he had executed such an instrument; he had not, in an absolute way, executed it by delivering it, for he had not given it to the parties. I do not wish to borrow any thing weak in point of argument, but let me suppose that he had sealed and delivered the deed in his own closet, and kept it in his pocket, without communicating it to the parties. Now, though I do not mean to contend that that might not operate as a delivery; for if there were no circumstances to show that it was delivered conditionally, it might be a delivery; yet what would be the effective purpose of it as it regards the grantor? The legal estate would be in the trustees; an ejectment might be brought by the trustees; but could it be endured that the trustees should bring an ejectment against the *cestui que* trust? They are still, in fact, to hold it for his benefit, and he is to receive the dividends, and rents,

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

rents, and profits; how could he be turned out then? He is therefore substantially the owner of the estate up to the last moment of his life.

Look, in another respect, to the intention of the party. Does he mean to part with his leasehold estate during his life? Does he mean, that if he has any intention to sell it, or to sell the 7,500*l.*, as it should be thought fit, that he shall not have power to do it? On the contrary, he reserves to himself the power of doing it with a single word, as I have stated, and I cannot put it stronger. He has a power to do it, not only by will, but by a codicil: he has nothing to do but to endorse on the deed,—'I revoke this deed,'—and sign his name, and there is an end to the deed; and no impediment is put in the way of his so disposing of this property. But it is clear that he never meant effectively to dispose of the property, when, *uno flatu*, he has given to the trustees the stock and leasehold estate, and he has given them that which he could not give without a will; he has given his plate, his books, his furniture, and his pictures, and all other his personal estate whatsoever, and wheresoever, which he may be possessed of at the time of his death, by a deed of gift. That cannot be in point of law; therefore it is clear he was not about any serious present disposition of his property. If he meant it to be a transaction *inter vivos*, he must have selected the articles at the time, and specify all the articles; therefore it is plain he did not mean to convey any thing to them at that time, or to part with a single iota of the property till his death. Then how is it to be contended that he did not remain in possession of, or had the power of disposing

posing of that property, which he purports, in form and show, to convey by this deed; and what has he done more than this,—I voluntarily do as I would by my will; I declare this to be my will, that is, that the property should go so and so. That is a will; and therefore I do not feel much the difficulty of the departure of the legal estate. At this day, to be sure, if he had never revoked it, it might operate as a deed, because that would have changed its complexion. He would have given it a new character by not exercising the power of revocation; but when he has revoked it, he sees the necessity there is to make a more particular determination with regard to the property disposed of, when he has annexed a will to it. The legal estate continues in the trustees; but does it continue in them by virtue of the deed as a deed, or by virtue of this instrument as a testamentary instrument? I say, it is a testamentary instrument; and at this day, taking it to be a testamentary instrument, they are possessed of the legal estate (independently of their character of trustees) as executors. Therefore I think it is clear that this is essentially and substantially the will of the party. And I was much influenced by that part of the argument of my learned brother *Richards*,—that the confirmatory part of the testamentary paper has a strong operation to cast the character of a will over every part of the deed; because we know that a confirmation of a deed is of itself a substantive conveyance: it passes the estate out of the person confirming the prior instrument, and that may be done as well by a will as a deed, and that is a mode of conveyance of land. That being the case, when he finds it necessary to confirm this by

1817.

ATTORNEY GENERAL v. JONES and BARTLETT.

by his will, (which was necessary, as a part of his property was fluctuating,) when he confirms that, I do not think it is straining the argument to say, that he confirmed the whole of this instrument, and gave it a final operation by that will. But I do not wish to rely so much upon that part of the case. The main point is, that it is in substance a will, and in form and name only a deed. Upon these grounds I think that the sum of money so given is subject to the legacy-duty.

THOMSON, *Chief Baron.* I shall be very short, because I do not think much longer time is necessary than has been already spent in discussing this question; and if it were, it would require more strength than I at present possess. The true question is, certainly, whether this instrument is to be taken as a deed, or as a testamentary act. If it is to be taken as a testamentary instrument, it is clear that the legacy-duty has attached upon this property, so far as it is given to this lady; and it has attached to the whole estate for which it is claimed, namely, the sum of 8,000*l.* for that is the residue retained for her after payment of all the testator's debts and legacies. So that it does not seem to be entangled with what, without doubt, it might have been,—how much is claimed as to legacies given by the will, or how much in respect of the money this lady is entitled to by the deed,—because the short and only question is, under what right she takes the whole of this money.

Now here is first an instrument which purports, by the form of it, to be a deed; it bears the name of an indenture, and is made by a person who may be called testator or grantor. For the present, we will call

call him grantor, while we talk of this instrument. He conveys, for a nominal consideration, to two trustees, who are parties to the deed, in general terms, first, a leasehold estate, of which he is possessed; and, after that, he assigns to them his government stock, which he specifies, and all the dividends which shall be due from it at the time of his death, and in short all his property, whatsoever, enumerating specifically certain things, as plate, linen, furniture, glass, and pictures, and all the moveable property, which in its nature was fluctuating during his lifetime, and must be so. He assigns to these two persons all that sort of property which would belong to him at the time of his death, to hold to them upon certain trusts; and those trusts are, that they should be possessed of it 'for the use, benefit, and advantage of *William Franklin*, for and during the term of his natural life:' leaving him in the possession of the corpus of the gift, or legacy, during his life, with full power of disposing of it, at his will and pleasure; for, it is not till after his death, that any other of the trusts are to arise. It is not in trust for him during his life, to receive the dividends merely, but the whole property is his, as long as he lives, implying a power in him to dispose of it, and spend it as he shall think proper; then, on his death only, are the other trusts to arise, and then the trustees are to act only on such property as is found —'all the property he is possessed of at the time of his death;'—and then it is to be applied to this lady, in the way mentioned. And he has reserved a power by any deed or writing, to revoke or alter

1816.

ATTORNEY GENERAL v. JONES and BARTLETT.

all or any of the trusts limited in the indenture of all that has been so assigned. He then makes a will, and I think it not immaterial, as has been observed, that that will expressly refers to the deed. By that he confirms the deed; he incorporates therefore the deed into the will, or I should rather say, he makes it a part of the testamentary act which he is then executing, and therefore they ought to be taken and construed together, as being of the same effect. The deed has no operation during his life; he remains master of the property till after his death, and then the deed can only take effect in the nature of a will, to be proved by the executors.

It would be very strange to suppose that that should be thought a gift, which leaves it in the power of the donor, whether there shall be 5,000*l.* or 5*l.* at his death; he may dispose of it or squander it, or do what he pleases. It seems to me, then, that there is no way of dealing with this instrument, but by giving it the effect of a testamentary paper; and I should have no difficulty in supposing the Ecclesiastical Court would grant probate of it, and I think they would in granting probate of it, designate the trustees as executors. In fact, the testator has made these very persons his executors, and they have obtained probate of the will; which will does refer in terms, and does confirm, excepting in the gift of a few legacies, the general provisions of that former instrument, which I call testamentary, in favour of this lady. The consequence of this is, as two of my learned brothers concur with me in thinking, that

that this is to be taken to be a testamentary act, and that the property in question is therefore subject to the legacy duty, and that there ought to be judgment for the Crown to the amount of this 800*l.*

1816.

ATTORNEY GENERAL *v.* JONES and BARTLETT.

Judgment for the Crown.

IN THE COURT OF CHANCERY.

HILL *v.* ATKINSON *.

ATKINSON *v.* HILL.

1816.

Tuesday, 10th December.

Payment into the Bank by trustees, (who were also executors of the will of the testator) of money bequeathed to them in trust to pay legacies, under a decree of the Court of Chancery, ordering that the money should be so paid in and laid out in the purchase of stock, in the name of the Accountant General, *which was accordingly done before the 10th of October* 1808, held to be *a retaining, &c. of the legacy* by the executors, within the words of the 48th *Geo.* III, cap. 149. sect. 3, and therefore *exempt from the legacy duty imposed by that Act*; (although it was not actually paid over to the persons beneficially entitled to the legacies till after that time) because the money was taken out of the hands of the executors, by their obedience to the order; and, as far as they were concerned, was thereby *appropriated* to the trusts of the will at that time.

IN this case *James Smith* had given by will, dated 25th *March* 1775, the sum of 3,000*l.* to his executors *Hill* and *Thompson*, in trust, to invest it in Government securities, as soon as conveniently they

* This case is introduced here, because it is one in which the decision of this Court in the case of the Attorney General *v.* Lady Louisa Manners, (vol. i., p. 411.) was brought under the consideration of the Lord Chancellor.

 might

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

might after his decease, and pay the interest to *Ann Atkinson* for her life, and after her decease to pay it over to the child with which she was then supposed to be enceint; but if such child should not attain the age of twenty-one, then to *Tabitha Leake*. On the 21st of *July* 1776 the testator died. By a decree of the Master of the Rolls, pronounced on the 9th *March* 1779, his Honour declared that *Ann Atkinson* was entitled to the interest of the 3,000*l.* at four per cent. during her life; and that, subject to her interest, *Tabitha Leake* was entitled to the principal, which was ordered in the mean time to be paid into the Bank, and laid out in the name of the Accountant General, in the purchase of Bank annuities in trust in the above causes; the interest to be paid to *Ann Atkinson* for life, and the principal, at her decease, to be transferred to *Tabitha Leake*, who was then an infant. *In the same year* (1779) *the* 3,000*l. was paid in, and laid out according to the exigency of that decree*, and the interest was afterwards regularly paid to *Ann Atkinson* during her life. *Tabitha Leake* afterwards married with one *Ward*, and her interest was, by a settlement on that marriage, transferred to trustees in trust, amongst other things, to pay *John Leake* 1,200*l.* borrowed by them at that time. In 1794 she died: in 1806 her husband became bankrupt; and in 1807 *Ann Atkinson* died. In 1808, the 1,200*l.* due to *John Leake* was paid off, under an order of court to sell so much of the stock for that purpose. In 1809, *Ward's* assignees having sold his interest in the residue of the stock, the purchaser objected to

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

to the title, that the legacy duty had not been paid which accrued due under the 48th *George* III. cap. 149, sched. 3, whereby a duty had been imposed on legacies given by the wills of persons dying before 1805, and not paid, delivered, retained, satisfied or discharged, till after the 10th *Oct.* 1808.

On a petition being presented on the part of the purchaser, and notice thereof given to the Attorney General and Commissioners of Stamps, an order was made directing the interest of the residue to be paid to the petitioner, without any deduction in respect of the duty. *Ward*, the bankrupt, died in 1816, when *John Leake* became entitled, under the settlement, to the residue of the stock standing in the name of the Accountant General in trust in these causes, and he obtained an order, on petition, for a transfer of it to him. That order was not obeyed by the Accountant General, on the ground of there being no receipt produced for the duty on the original legacy; when, by the direction of the Lord Chancellor, a petition was presented on the part of the Attorney General and the Commissioners of Stamps, claiming the duty under the statute.

Wetherell, and *Heald*, in support of the petition, contended, that what had been done by the executors in this case brought the legacy within the terms of the act; because the legacy had not been paid, delivered, retained, satisfied, or discharged, till after the 11th of *Oct.* 1808; inasmuch

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

as the principal had not been paid over till after that time, nor was, in fact, transferred at the time of this discussion: and they cited the case of the *Attorney General* v. *Lady Louisa Manners (a)*, where the Court of Exchequer held, that a legacy could not be said to be retained for the benefit of legatees, so as to exempt it from the duty, till the persons who should be ultimately entitled to any interest in it had received it.

Sir Arthur Pigott, and *Parker*, distinguished that case from the present, by the circumstance of the uncertainty which existed there, of the person to be ultimately entitled to the legacy, till after the death of an intermediate legatee, which did not happen till 1812; but that in this case there was no such uncertainty, and the payment into the Bank, and the investment of the money in the funds under a decree of this Court, which put it completely out of the power of the execution, and, as it were, appropriated at once the legacies, was sufficient to satisfy the words of the act. In the case cited, too, the money had been constantly, up to the year 1812, retained in the funds by the executors for the purposes of the will, in their own names; whereas in the present case it has, since the year 1779, stood in the name of the Accountant General in trust in these causes.

The LORD CHANCELLOR now gave judgment; when, after having fully stated all the facts of the

(a) Ante, vol. 1, p. 411.

case,

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

case, observing, that he regarded all the claimants on this legacy as against *Tabitha Leake*, whether under the marriage settlements or by the assignments, as persons standing in the same situation as she herself would have been in if she had received the money as the legatee under the will;—that the difficulty which brought the case originally before the Master of the Rolls, arose out of the question, whether, as *Ann Atkinson* had never been with child, as the testator had believed when he made this will in her favor, the bequests did not, as depending on the life of such child, entirely fail: but the Master of the Rolls was of opinion that the right was in *Tabitha Leake*, and decreed accordingly, before any legacy act had passed, that the money should be paid into the bank; as had been done, with liberty for *Ann Atkinson* to apply for a transfer when she should arrive at the age of 21. His lordship then stated the question to be, whether under the circumstances of this case the legacy duty was payable as imposed by any of the acts of parliament from the 20th to the 48th *Geo.* III.*; and he took a minute and anxious view of all those statutes, particularly the 52d chap. of the 36th *Geo.* III., observing, that that was confined to the duties thereby imposed, to the exclusion of the former acts; and particularly noticing the clause which constitutes the executor, or other person taking on himself the burthen of the execution of a will, a Crown debtor, from the time when the

* 20th *Geo.* III, cap. 28; 23d, cap. 58; 29th, cap. 51; 36th, cap. 52; 44th, cap. 98; 45th, cap. 28; 48th, cap. 149.

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

legacy is paid, if the duty be not then deducted and accounted for; and declaring it to be his opinion, that Courts, into which money bequeathed in trust to pay legacies, should be paid, as in the present instance, were bound to consider whether it would be liable to any duty, if still in the hands of the executor; and that question *(continued his Lordship)* will depend on whether that which has been done by the executor in the present case, amounts to such an appropriaton as would operate as a satisfaction and discharge, according to the meaning of the several statutes.

I shall make but few observations upon the case which has been cited from the Court of Exchequer. I think that case is an authority, as far as it goes —I say only as far as it goes, because, as it is not direct upon the point, it is only a negative authority; but it decides, that if the legacy, which was the subject of it, had been appropriated, it would not then have been liable to the duty; and, it appears to me, that the judgment of the Court in that case, proceeded upon this, (without prejudice to the question in the present case), that that legacy had not been, in fact, appropriated; for if it had been appropriated in such a manner, that you could say who were the individuals, who could come to the Court and ask for it, it would have been quite another thing; but inasmuch as that remained uncertain up to the last moment, the Court seem to have thought that, therefore, there had not been, in fact, an appropriation.—Whether there was or not, in that case, I shall not take upon myself to say, nor shall I say one

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

one word further upon the question of appropriation, but this, (which I say, lest taking no notice of it should shake what I take to have been the doctrine of this Court for ages)—that if executors, being also trustees, shift the property from their hands as executors, into their hands as trustees, and if there is evidence that they have done so, and that they have paid the interest upon the fund so shifted from hand to hand, for twenty years together, that is undoubtedly an appropriation. If the Court of Exchequer are of opinion, that that is not an appropriation, all I can say is, that that is an opinion to which I cannot accede.—But when I come to consider the present case, and to trace it through all that has happened, supposing the question were to be put upon the Act of the 48th of the King only, which I think is not the proper way, it appears to me to be out of all right to say, that where a legacy has been given to two executors upon trust, that they should pay the interest to one for life, and afterwards should pay the principal to another,—where that legacy has been brought into Court, and the trusts of it have been declared, whereby it is wholly taken out of the hands of the executors,—and where it never can be paid out of this Court again, without considering whether it is liable to the legacy duty (although it has been out of the executor's hands for half a century), without making him a crown debtor from the moment that it is payable;—that appears to me to be a proposition going beyond any thing I recollect ever to have been made a question in this Court.

But

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

But this case is not to be decided upon that act. I think it depends on the construction of the 44th of the King, as an arrear due, if due at all, under the 48th; and upon the effect of the 44th, considered with a due regard to all the provisions of the act of the 36th of *Geo.* III, as if those provisions formed a part of the act of the 44th, so far as in their nature they can possibly be applied to legacies given by that act: and then the question would be, whether, (regard being had to the 25th clause, with reference to what the Court are required to do, and with reference to the payment—the time of payment—and the responsibility of the persons who receive and the persons who pay the legacy, without having first paid the duty—and the other provisions which have been observed upon) it can be said that this was a fund, out of which the legislature, by the 44th of *Geo.* III, adopting the provisions of the 36th, meant to say, that the legacy duty should be paid by the Accountant General, when carried to the account of the persons described and designated as intended to take it by virtue of this will. My opinion is, that that is not the true construction of those acts, when construed in conformity to all I have ever understood to be the effect of the act of 1796.

I have ever considered that, after legacies were once paid, discharged, satisfied, or (which I consider as amounting to the same thing) appropriated in such a way as that the property was completely out of the hands of the executor, and he had nothing

1816.

HILL v. ATKINSON. ATKINSON v. HILL.

thing more to do with it, it was not intended that these duties should attach. If that opinion should happen to be in its consequences more extensive than I conceive it is, it is still my duty to state it as that which I take to be the best construction of this act. I cannot look to consequences on the one side or the other, I must take the rule the legislature has laid down as I understand it, for the rule of my conduct; and I cannot bring myself to believe, that within the meaning of these laws, or within the meaning of the Court of Exchequer, this legacy was not appropriated so long ago as 1779, so as to be altogether without the reach and effect of the acts imposing a duty on legacies as legacies. This is my judgment, upon the best consideration I can give the case; and I am afraid that no further consideration will enable me to alter that opinion.

COKBURNE

1817.

Friday, 16th January.

1814.
SERJEANT'S INN.
Monday, Tuesday, Thursday, and Friday, 19th, 20th, 22d, and 23d Dec.

1815.
GRAY'S INN HALL.
Monday, Monday, 6th and 27th February.

CUSTOMS OF TITHING.

A custom that the farmer shall hattock his wheat, and that in consideration of his doing so, he is to pay the eleventh part *or* shock, *or* hattock, is good;—and it is sufficiently well laid in the alternative.

COKBURNE *v.* HUGHES and others.

TO this bill, filed by the Rector of the parish of *Norton* in *Hales, (Salop,)* for an account and payment of various tithes, the defendants pleaded the following customs as to the corn—and various moduses:—denying the plaintiff's right to receive the tithes in any other manner:—

"That all the defendant's farms and lands are situate in, and form part of the parish of Norton, in Hales; and that by ancient and immemorial usage, custom, and prescription within the said parish (which extends to all lands within the same, except certain lands therein mentioned to belong to Sir John Chetwode, baronet, for which a modus of 9*s.* 8*d.* is payable), the tenants and occupiers of all the lands within the said parish, and the tithe-able places thereof (except as before excepted) from time whereof the memory of man is not to the contrary, have been used and accustomed yearly and every year, when their said lands have been sown

The disproportion of the diminution of the tithe to the value of the additional labour employed on the corn, is no objection to such a custom; all that is required to support it being a consideration, though it be very far short of an equivalent.

A custom that barley and oats shall, if so hattocked, pay the eleventh part or shock or hattock, for the tithe; *or*, if only set out in cocks, (the common mode) the tenth part, &c. is good, notwithstanding its apparent uncertainty, duplicity, or want of mutuality.

And issues will be granted to try the existence of such customs.

A hay modus of 2*d.* for a *day's math* of grass, is good, the quantum being matter of evidence.

See also as to certain other moduses.

with

1817.

COKBURNE v. HUGHES and others.

with wheat, muncorn, rye, or beans, or other corn usually bound up in sheaves, after the reaping, mowing, or cutting thereof, to set up in shocks or hattocks, all such corn produced upon their said farms and lands, after the same has been so bound up in sheaves, before setting out any tithe thereof; and after such corn has been so bound and set up in shocks or hattocks, to set out the eleventh part thereof from the other ten parts thereof; and there now is, and during all the time aforesaid, hath been in each and every such year due and paid and payable to the rector of the said rectory for the time being, such *eleventh part* OR *sheaf* OR *hattock* of such corn so bound and set up, and no more, as and for a customary tithing and full compensation for and in lieu and satisfaction of all and all manner of tithes of such corn.'

'That by the custom within the said parish, all wheat, muncorn, rye, and beans, produced upon the lands within the said parish, are bound and set up in manner aforesaid, after the same have been mowed, cut or reaped; and that all barley and oats, and all other corn produced upon the said lands, or any part thereof, are so bound and set up, *or* are collected together in loose cocks *at the option and discretion of the tenant* or occupier of the lands producing the same; and that such tenants and occupiers have from time immemorial been used and accustomed yearly and every year, when such barley and oats, or any other corn or grain has been so bound and set up by them, to set out the eleventh part from the other ten parts thereof; and that

1817.

COKBURNE v. HUGHES and others.

that there now is, and during all the time aforesaid hath been, in each and every such year due and paid and payable to the rector of the said rectory for the time being, such eleventh part of such barley and oats, and of all other corn and grain so bound and set up, and no more, as and for a customary tithing and full compensation for and in lieu and satisfaction of all and all manner of tithes of such barley, oats, or other corn or grain; but the rector of the said rectory has always been entitled to, and has always received the tenth part or cock of all barley and oats, and all other corn and grain produced upon the said lands, when the same has been got in loose, and not so bound and set up, or of such part thereof as has not been so bound and set up.'

And the answer further stated, that the setting up and taking care of the tithes of the said wheat and other corn usually bound in sheaves, and the binding, setting up, and taking care of the tithes of the said barley and oats, and other corn, not usually so bound, is attended with considerable extra labour and expense to the occupier or occupiers of the said lands, and is productive of great additional profit, security, and advantage to the rector of the said parish.

That the defendants did severally in the year, in the bill mentioned, duly set out the eleventh part, shock, hattock, or sheaf, of all the wheat and other corn produced upon their said lands, which were so bound and set up in shocks or hattocks; and the tenth part or cock of all corn and grain which was not

not so bound and set up, produced upon their said farms and lands, and gave regular notice to the plaintiff that the same had been so set out.

That no tithes are due for the produce of the several gardens occupied by the defendants, for that they are ancient gardens, and are all situate within the said parish of Norton, in Hales; and that from time immemorial there hath been paid and payable by the tenants and occupiers of such several gardens to the rector of the said rectory for the time being, at Easter, or as soon after as the same should be demanded in each and every year, the sum of 1 *d.*, called a garden penny, for each and every such garden, as a modus, in lieu and full satisfaction of all herbs, roots, garden stuff, and fruit yearly arising, growing, and renewing upon such gardens.

And the defendants denied that the plaintiff was entitled to any tithes in kind of any clover, rye, grass, or other grass which may have been produced upon their farms and lands, and which have been converted and made into hay, or of any milk or calves which may have been yielded or produced by any cows, or of any colts which have been produced by any mares, which have been kept, fed, and depastured upon their said farms and lands, or for the agistment of any dry barren cow, or of any calves of the first year, or of any young cattle of the second or third year, reared and kept upon any lands in the said parish, for the plough or pail, and not sold out of the said parish before they have been brought to these uses, or of any cattle fed on aftermath, or to any

1817.

COKBURNE v. HUGHES and others.

any other compensation in lieu of such tithes of hay, milk, calves, colts, and agistment, than hereinafter mentioned; for defendants say, that by ancient and immemorial usage, custom, and prescription within the said parish (and which extends to all the lands within the parish, unless it be to the lands before mentioned to belong to Sir John Chetwode), all the lands within the said parish (unless as before mentioned), from time immemorial have been and now are exempt from the payment of tithes in kind for all hay, milk, calves, and colts produced thereon, and for the agistment of all dry barren cows, or any satisfaction for the same, except the moduses hereinafter mentioned; and that there now is, and from time whereof the memory of man is not to the contrary, hath been paid and payable to the rector of the said parish for the time being, at Easter, or so soon after as aforesaid, in each and every year, the sum of 2 *d.* by the occupier or occupiers for the time being of all the farms and lands within the said parish (except as before mentioned), for each and every day math or acre of their said lands, upon which any sort of grass has, during the year, been produced and converted into hay, and so in proportion for a greater or less quantity than an acre or day math, as a modus for and in lieu and in satisfaction of the tithes of such hay and grass.

And the sum of 4 *d.* for every colt produced by any mare.

And the sum of 1½ *d.* for each and every cow producing calf, and yielding milk, kept and depastured

tured upon any of their said farms and lands during the year, that is to say, 1 *d.* for the milk, and one halfpenny for the calf of such cow.

And the sum of 1 *d.* for every cow yielding milk, but producing no calf, as and for the tithe of such milk.

And the sum of 1 *d.* for the agistment of every dry, barren cow, kept and depastured upon their said farms and lands, during each year, as moduses for and lieu of and in full satisfaction for all tithes of hay, grass, milk, colts, and calves, and of the agistment of such dry, barren cows.

And the answer stated, that a daymath is uniformly and universally, within the said parish, acknowledged and known to be co-extensive with, and to mean the same as a statute acre.

Clarke, *Copley*, Serjt., and *Wetherell*, on the part of the plaintiffs, contended; 1st, That the customs, as laid in the answer, were not so pleaded as that the Court could take notice of that defence; for that the custom, as to the wheat, was so stated, as to be obviously vicious; because from what appeared on the face of it, as laid, it must be considered a bad and illegal custom. For it is stated, "that the wheat is to be set up in shocks or hattocks;" and after it is so bound and set up, the custom is to set out the eleventh part thereof, "and that there is payable to the rector, such eleventh *part*, OR *shock*, OR *hattock*, and no more, as and for a customary

 tithing."

1817.

COBBURNE v. HUGHES and others.

tithing." Such a custom is bad for uncertainty, because it is not stated at whose election the corn is to be set out in either of those forms, or whether that is to be determined by the parson or the land occupier. Nor is it carried far enough; for it is not stated what is to be done with the odd sheaves, if the corn should be set up in shocks or hattocks. It is impossible that the parson can collect from this statement of the custom, with any degree of certainty, what he is to receive, or how he is to receive it; for the corn may be either set out in hattocks, or (if they are taken to pieces again, as the farmer may do consistently with this custom) in sheaves, and in either case he is to have only the eleventh. Then it is not stated, in laying this custom, *when* the corn is to be considered titheable, which is uniformly enquired as a necessary part of the statement of a custom, and is to be found in all pleadings where a custom is set up. It is stated, certainly, that the corn is titheable *after* it is set up in hattocks, but not how soon after. Nor again is it stated of what number of sheaves the hattocks consist, and for any thing that appears, different hattocks may consist of a different number of sheaves, which would render a fair tithing impossible from the consequent inequality. And that objection is sanctioned by the authority of this Court, in *Tennant* v. *Stubbing* (*a*).

A further objection was taken to the custom as laid with respect to the tithing the barley and oats,—

(*a*) 3 Anstr. 643.

that

1817.

COKBURNE v. HUGHES and others.

that it was left to the option of the farmer either to set out the tithe according to the common-law mode of tithing by the tenth cock, or to adopt the alleged custom of hattocking, and pay an eleventh part; whereas it is indispensably necessary to a good custom, that it should be single and entire, and mutually binding upon both the parties: but this is compulsory on one party only, and is adoptible wholly at the caprice or convenience of the other. That election renders this custom (which is in effect a modus) desultory, which is a fatal objection, and so it was held in the case of *Webber* v. *Taylor(b)*, where a modus was laid for the payment of a sum of money, while the land was in the hands of the proprietor; but if in the hands of any other person, the tithe was to be paid in kind, or the money at the election of the parson; and it was held by the Chancellor to be clearly ill, "because a modus cannot be desultory," (*Bl. Com.* Vol. I. p. 78.) This is liable to precisely the same objection, for it is laid here in the alternative. That which might have been originally good as an agreement, is not always good as a custom, for an agreement may be binding at the time, although not so much so as to be suffered to ripen into a custom. Then as these customs are laid, they are both bad, that which regards the wheat for uncertainty, and that, as to the barley and oats, is still more so, from the additional objections of want of mutuality, and duplicity. A custom of tithing is, in effect, a modus, and requires

(b) Sel. Cas. in Ch. 52.—and Gw. 656.—Startup v. Dodderidge—2 Gw. 587.

1817.

COKBURNE v. HUGHES and others.

to be laid, in pleading, with all the strictness and certainty of a modus, and is not to be loosely laid, leaving its defects to be cured by the evidence to be adduced. It must appear on the record what the mode of tithing is, and how it is to be effected; that has not been done in the present instance, and therefore the defendant is not entitled to avail himself of a defence so ill pleaded.

If, however, the Court should be of opinion that the objections taken to the laying of these customs, in point of form, are not such as are fatal, they will then have to consider the more serious defects in point of substance, which, it is contended, vitiate this defence.

The principal objection is, that according to these customs, there is no fair consideration moving to the clergyman for the diminution of his tithe. It is not meant to be contended that the consideration should be actually an equivalent; but it must be reasonable, or at least plausible, otherwise it is impossible that the customs can be sustained; because, if they are unreasonable they are void. The additional labour given to the corn by the farmer, will be said to be the consideration for diminishing the common-law right of the rector in this case, by allotting him the eleventh instead of the tenth part of the titheable article; but that will not be sufficient, if it be not shown to have been given to it for the benefit of the parson, or, if not wholly so, at least in part, and that it redounds in some way proportionally to his benefit.

They

1817.

COKBURNE v. HUGHES and others.

They then adverted to the evidence, from which it appeared that according to a calculation founded on the depositions of the witnesses, that the setting up the corn in hattocks, if done by the parson himself, would amount to but a mere trifle (a penny an acre), and that it was an operation which the farmer was obliged to perform for the sake of his own corn, and which, as he could not do it before the tithe was set out without permission of the clergyman, (who would be entitled to take his tithes while the wheat was in sheaf, or the other corn in cock,) that permission alone would be a most ample equivalent, if any were due, for what was so done for the benefit of the farmer.

To show how palpably inadequate the compensation, as set up by the custom, was, in proportion to the diminution of the tithe (and that without measuring it scrupulously) from the calculation founded on the facts so furnished by the witnesses, it was made to appear that the expense of putting the corn into hattocks, to the farmer, was one shilling an acre; so that the clergyman must submit to a deduction of an eleventh part of his income arising from the corn tithe, because the farmer, for his own sake, put his wheat into hattocks*, in consideration of an expense amounting (as far as concerned the tithe) to about a penny an acre; whereas, at an ordinary rate of the price of wheat, the tithe of the same quantity for which the hattocking was to be the compensation (the tenth of the average produce

* The witnesses stated that a hattock consisted of eight sheaves.

1817.

COKBURNE v. HUGHES and others.

of an acre) would be worth about two shillings, and the rector would also be deprived of his common-law right to the advantage of comparing *the sheaves*, which he would have while the corn was titheable when in that state, (and they cited for that, the case of *Shallcross* v. *Jowle*,) *(b)*—which was a commutation, that it was so absurd to suppose that they who formerly had the care of the interests of the church should have acceded to, as to be unreasonable on the face of it, and could not therefore be suffered to go to an issue when so obvious an objection was apparent on the record in Court, and which could not but be noticed.

To establish the principle for which they contended, that although actual equivalence of consideration was not necessary to the validity of such a custom, yet that it must be capable of being shown to be founded on some ground of at least reasonable consideration on the behalf of the church; they cited several cases. But to remove, in the first place, any impression against such a proposition, which might be raised by certain cases, which would probably be cited for the defendants, they submitted that in the case of *Ledgar* v. *Langley (c)*, the consideration was merely for discharge from a very inconsiderable tithe,—that of rakings; for which any compensation almost might perhaps have been equivalent, or at least reasonable. There is also an anonymous case in *Lach (d)*, that a custom to put up the sheaves in shocks, discharged the parishioners of the tithe for odd sheaves which would not make

(b) 13 East, 261. *(c)* 1 Sid. 283. *(d)* Page 226.

a shock,

a shock, was held good. In that case also the same observation applies; but there was now considerable doubt if that decision were law. When an attempt was made to carry that doctrine further, which was done in *Trewin* v. *Bond (e)*, the Court there declared, that a custom to set up wheat in sticks (six sheaves against six), or in stitches (five sheaves against five), under which, if there were any odd stick or stitch not amounting to a stick or stitch, no tithe was payable, was void, completely overthrowing the case in *Lach*. The decision in *Trewin* v. *Bond* was adopted in the subsequent case of *Snow* v. *Hewitt*, and is to be found in many others *(f)*; and the ground of all those decisions must have been, that the compensation was inadequate. Adverting to the case of *Smyth* v. *Sambrook (g)*, then recently decided in the Court of King's Bench, as one which would probably be much relied on for the defendants, they endeavoured to distinguish it from the present, by the ground on which the judgment of the Court proceeded,—that there was in that case an adequate consideration for the custom,—because, (as the Court held) the additional trouble taken on such a course of husbandry, in the re-opening of the shocks in wet weather for the purpose of ventilation, whereby the corn was advanced one stage in its progress, was considered to be such an adequate consideration as

(e) 1 Wood, 398.—2 Gw. 565.

(f) ib. 368. Yard v. Stobell, 1 ib. 312. Bendish v. Kemble, 2 ib. 345. Townley v. Tomlinson, 3 ib. Taylor v. Beaumont, 3 ib. 401. Bishop of Exeter v. Skinner, ib. 485. Gregor v. Nicholas, 2 ib. 536; and Robinson v. Barroby, 4 ib. 100. See also most of these cases in Gwillim *passim*.

(g) 1 M. & S. 66.

1817.

COKBURNE v. HUGHES and others.

would support that custom. As far, therefore, as that case bore on the present, they contended that it furnished the very principle on which the plaintiff's case rested, and confirmed the doctrine of the necessity of every custom being shown to be founded on some reasonable consideration to be entitled to the attention of the Court. They made the same observations on the dictum of Lord *Kenyon*, in the case of *Knight* v. *Halsey (h)*; and they urged the effect of all those cases to be found in the books, wherein it appeared that the labour of hattocking had not been compensated at all, the farmer still paying the tenth.

The plaintiff's counsel finally objected, that the custom was not well established by the evidence, and principally, because it did not appear to have been noticed in any one of the terriers, which usually mentioned customs of tithing; the common modus of a money payment (which is, in fact, merely a custom of tithing) being generally recorded in such documents, wherever they affected the common-law right of the church.

The same arguments were urged against the custom as to the barley and oats, with the additional objections arising from the duplicity of the custom already pressed in the arguments against the mode of laying it in the pleadings.

The pay modus of 2*d.* for a day's math. They objected, 1st, that that was uncertain as to the quantity, both in itself and as attempted to be

(h) 7 T. R. 93.

proved,

proved, for the witnesses had described it (*inter sese*) as consisting of different quantities; and some had stated that it was a measurement corresponding with a statute acre, whereas the acre was not defined by statute till the reign of *Edward* I., long after legal memory; and 2dly, that (if that objection were not destructive of it) as it was restricted in the earliest terriers to the ancient meadowing, the extent of that species of land in this parish ought to be clearly set out*.

As to the milk modus, that also they submitted was confined, by the evidence of terriers, to the cow and calf kept by the parishioners for their own use, which did not therefore support the general modus for cow and calf as laid in the answer.

Fonblanque, *Dauncey*, and *Pepys*, for the defendants, contended, in answer to what they considered the main ground of the plaintiff's case,—the want of a competent consideration for the custom,—that it never had been considered necessary to the establishment of such an agreement as that on which the custom pleaded was founded, that the additional labour, in consideration of which the tithe was diminished, should be either an adequate or equivalent compensation; and all that had ever been required by the Court was, that there should be some consideration. It is clear from all the cases, that corn may be legally set out in hattocks, by

* Vide Foxcroft v. Paris, 4 Gw. 1529:—where it is said that an objection to the description of the lands for which the exemption is claimed, should be taken by way of exceptions to the answer; and that it is too late at the hearing.

agreement

1817.

COKBURNE v. HUGHES and others.

agreement between the parties; and though in some instances the tenth may still be paid to the rector, yet if he should, in consideration of the additional labour, agree to take an eleventh, such an agreement would be binding, and might ripen into a custom; and that is an answer to the argument founded on the facilities said to be afforded to the occupier for defrauding the tithe-owner by this mode of setting out the tithes. The principle of the case in *Lach* remains untouched by any other decision, and was expressly recognized by Lord *Kenyon*, (who was personally acquainted with the course of husbandry in this part of the country,) in the case of *Knight* v. *Halsey*. But the recent case of *Smyth* v. *Sambrook* is quite decisive on the point. There the Court of King's Bench expressly held, after much argument and consideration, that such a custom was good; and in that case this custom was questioned for the first time, after a lapse of centuries, which was improbable, if it really had been an illegal custom founded on no consideration. The ground of that decision was, that the consideration, though not equivalent, was sufficient; and it is in that, and many other respects, completely decisive of this case, which in most of its circumstances it very nearly approaches.

In answer to the objections made to the laying the custom in the defendant's answer, they contended, 1st, that there was no uncertainty in it, as laid, as to the wheat; and submitted that it was sufficient, in an answer, so to lay a custom as that it may be certain to a common intent, if it furnished enough to apprize the plaintiff of the substance of the

1817.

COKBURNE v. HUGHES and others.

the defence, and that it was allowable to assist it by evidence of the facts by which it was ultimately to be supported. The principal objection then arises on the custom as to the barley and oats. It is said that that is defective on other grounds, because an option is given to the farmer to adopt one of two modes of tithing,—one excluding, the other admitting the custom, adding duplicity to uncertainty, and rendering it obligatory on one party only; and the case of *Webber* v. *Taylor* has been cited to show that such a custom cannot be established. Now, besides the distinction that that was a case of a bill filed to establish a modus, the doctrine in the case of *Chapman* v. *The Bishop of Lincoln (i)*, upholds this custom against any objection to it founded on that decision. The substance of this custom is, that if the farmer gathers in his barley, &c. in the usual manner in cocks, without sheafing it, it pays the tenth in the ordinary course; but that whenever the season requires that the farmer should set up the barley, &c. as he does the wheat, it then pays an eleventh; that is, when the additional labour is not bestowed on it, it pays the common law tithe; but when it is, it pays the customary tithe. That is a modus in the alternative certainly, but it is nevertheless certain; and if there were any doubt about its validity, what is said by the judges in the case of *Chapman* v. *The Bishop of Lincoln*, would remove it; for that cases furnishes a general principle for judging of the validity of these moduses. The language of

(i) Gw. 679.

Mr.

1817.

COKBURNE v. HUGHES and others.

Mr. Justice *Fortescue*, in speaking of that modus, is peculiarly applicable in behalf of this custom: "But" (says he, in answer to an objection for uncertainty) "can any case happen in which the "parson would not either have this modus or the "tithes?" The same may be said here. Mr. Justice *Reynolds* also says, "This modus is not uncer-"tain, because the parson is now to have a modus, "and now to be paid tithes;" and both their Lordships, as well as the *Lord Chancellor*, say, that the case of *Bowdly* v. *Bushell (k)* cited for the defendant in that case, is not law; and the result of that discussion was, that as a contract might have been made between the parties on what terms they pleased, the Court held itself bound to respect a long established custom, the original reasonableness of which could not, at so great a distance of time, be discovered. The doctrine of that case was recognized and adopted in that of *Hardcastle* v. *Smithson (l)*, on the principle proceeded on in all Courts, of great reluctance, *quieta movere*.

As to the custom not having been noticed in the ancient terriers, they submitted that it was not necessarily the province of a terrier to notice moduses of any kind, although they certainly often do in modern times.

With regard to the hay modus, they contended that it was sufficient to state it as a payment for a day's math, leaving it to the witnesses to show of

(k) 1 Lev. 116. & 1 Kel. 602. (l) 3 Atk. 245.

what

1817.

COKBURNE v. HUGHES and others.

what quantity of land that measure consisted: and as to some of them having described it with reference to a statute acre, that was merely as a now well-known standard of quantity, and not as being the foundation of the term, and so destructive of its necessary antiquity; and both its quantity and its restriction to ancient meadow, or extension to all grass, should be the subject of an issue, when the plaintiff would have an opportunity of shewing, if he could, that tithes in kind had been at any time paid for any grass in the parish, in contradiction to the terriers.

The same observations were made in answer to the objections taken to the modus for milk.

Clarke replied.

THOMSON, *Chief Baron*, now delivered the judgment of the Court.

This case of *Cokburne* v. *Hughes*, is one that took up a very considerable time in the argument, which occupied several days, and was a good deal entangled by a reference to a variety of cases, which though certainly not altogether not bearing on the subject, were yet cases that did not at all seem to decide it.

The demand was for certain tithes of land within the parish of Norton in Hales, in Shropshire. There were great tithes and small tithes. The plaintiff is rector of that parish. The defence was entirely prescription and moduses.

With

1817.

COKBURNE v. HUGHES and others.

With respect to the corn tithes, the defence was, that it was duly set out, although the eleventh part only was set out, being the eleventh hattock, because by the custom of the parish, with the exception only of one small estate, which was covered by a modus, all the lands producing corn are exempt from paying more than the eleventh hattock, and that in consideration of their setting out the corn in the hattock, instead of the sheaf. This is one custom, and it is an imperative custom on the occupier so to set out his tithe, and gives him no election, he is therefore bound to set it out in hattocks, and pay the eleventh hattock. This applies to wheat, and muncorn, and rye.

The other question is with respect to barley and oats. The prescription there set out is, that they shall pay the eleventh part of the corn when set out in hattocks, that is the eleventh hattock, if it is so set out; but that it is in the option of the tenant, either to set it out in the hattock, and pay the eleventh hattock, or to pay the tithe, which would be the tenth of the barley in the cock; so that with regard to the barley, provided the tenant chooses to do more than the law requires of him, he is put in the same situation as if it was the hard corn, for all that the law requires, with regard to the hard corn, is to set it out in the sheaf; but he does more, he sets it out in the hattocks, and pays the eleventh, and so with regard to the barley, he is to pay but the eleventh, when he so sets it out.

There were a great many cases mentioned on this occasion,

occasion, and referred to. There was one in particular, the case of *Smyth* v. *Sambrook*, which seems to be very material, on this occasion, for the guiding our judgment; it is 1 *Maul. Selwyn*, 66. That was an action for not setting out tithes of different descriptions, namely, wheat and barley, together, I think, with peas and vetches. The prescription there was with regard to the wheat, to set it out in the hattock, and in consideration of so doing, and also in consideration of opening and airing it, if occasion required, then that they should pay only the eleventh part of it. With regard to the hard corn, the wheat, and corn of that description, the Court was of opinion that it was a good custom; and so unquestionably it was, because the farmer had done more than the law compelled him to do, and he had done that which was for the benefit and advantage of the tithe-owner, for he had brought the article into a further state of progress to its being ultimately disposed of, namely, by having put it up in hattocks, a more easy way for conveying and unlading it, and he had, if occasion required, opened the sheaves to dry them.

But with regard to the eleventh part of the barley the Court thought there was no consideration for so tithing it; for the farmer was bound to set it out in the cock, which is the usual mode, when the tenth would be paid of course; and when set out in the cock or the heap, and not in sheaves, the farmer bestowed no extraordinary labour upon it. It was really, therefore, the common way in which barley is titheable; it was merely raked and got together

1817.

COKBURNE v. HUGHES and others.

together in the cock. There seemed to be no reason why he should not pay the tenth of that barley; and though it was stated that he occasionally opened it, yet that was before the tithe was set out, and before it was ascertained what the parson was entitled to; so that the airing of it was for his own benefit solely, and not for the benefit of the parson. There were other cases referred to, which do not, as we think, bear so strongly upon this case as to require minute attention.

On the part of the plaintiff, in the present case, they entered into a long examination, with a good deal of speculation belonging to it, and the witnesses say how much it would cost the farmer to make this alteration of putting up the corn in hattocks instead of cocks; and that was used to show that the eleventh hattock was too favourable a bargain for the tenant, and greatly to the disadvantage of the parson. There was a good deal of speculation upon that; but it is not required that there should be always an exact *quid pro quo* in these compensations; it is enough to show that there is a consideration for the deduction. And we see that the farmer has done more in fact than the law compelled him to do; for instead of setting out the wheat in the sheaf, and the barley and oats in the cock, he brought both into a further stage of husbandry; and whether there was a little more advantage on one side or on the other, in doing so, that is not for us to decide; nor is it necessary for us to enquire whether, when this compact was originally made, the parties proceeded on any such nice calculations. That is the case of the wheat; and

1817.

COKBURNE v. HUGHES and others.

and the same thing applies with regard to the barley, taking it with the distinction I have stated, that sometimes there was nothing done with that beyond putting it into the cock, which was the common way of tithing it, except that if it was wet, it was opened. In this case, if the farmer leaves it in that state, that is, in the cock, he must then pay the tenth of those cocks; but if he puts himself to further trouble and expense, then the law gives him the privilege of paying so much less, namely, the eleventh; and it does not go to confine the parson to nothing beyond the eleventh, because he would be entitled to the tithe of the odd sheaves, if there should be any. It seems to me, therefore, that there is no objection to this custom as laid, provided it is established; and with regard to the evidence before us, it certainly does seem to be made out, for there are terriers that recognize that mode of tithing; but it is for the jury to decide on that. I think there should be an issue in the terms of this custom as laid, to ascertain how the fact stands.

1. With regard to hay, there is a modus set up of 2*d.* for every day's math of hay; that is also an ancient payment recognized by the old terriers more than an hundred years ago, and there is no evidence of tithe having been ever otherwise set out than by this payment of 2*d.* But the expression is, for every day's math of hay: and it was argued, that it is so uncertain what a day's math is, that you cannot possibly take notice of it. We certainly have had many cases in which the term has occurred: and in general it is understood to be an acre,

1817.

COKBURNE v. HUGHES and others.

and issues have been directed upon it. There was an issue directed in *Markam* v. *Huxley*, 4 Gw. 1499, and there, a day's math was held good. The witnesses here say it is the quantity of an acre: the terrier in 1635 or 1735, I am not sure which, specifies, that "for every acre or day's math," (putting it as the same thing,) this modus of 2*d.* was payable; and one witness says, he always understood that to be an acre of hay or hay grass: that is the case of this modus, and if the clergyman desires it, he may have an issue to try it.

With regard to milk, there are specified in the terriers payments which purport to be a modus for that, —'so much for cow and calf,' which imports in lieu milk: the terriers call it so. There seems to be no objection to a modus of that description being a good one. There is one thing however which I do not understand: one of the defendants admits he has had a barren cow; does that mean a cow that has not produced a calf in the parish? because that would make no difference if she produces milk, for the modus applies to the milk. There is no specific modus for agistment; nor is there any agistment made out, but what is admitted in the way I have spoken of. There is a modus for gardens, to which there can be no sort of objection: it is only 1*d.* for every ancient garden. There is also a modus for colts, and other trivial moduses not worth attending to. If the clergyman desires issues on these, he is entitled to them; as he is on the more material ones for corn and barley, and hay. It is in evidence that several of these defendants occupy what

what the witnesses understand to be ancient meadows; the jury may indorse on the *postea* whether the meadows and lands from which they have had the hay are ancient meadows or not, and they may indorse whether the modus applies to ancient meadows only, or to all; and if it applies to ancient meadows only, whether the defendants are in possession of those ancient meadows, or any of them; and that I think will be the most correct way.

1817.

COKBURNE v. HUGHES and others.

The ATTORNEY GENERAL *v.* WILSON, claiming the ship *Jane*.

THIS was an information for the condemnation of a ship called the *Jane*, and her cargo, on the ground of an illicit importation of flax-seed, mats, oars, deal-ends, and handspikes, from *Russia*.

(Construction of statutes.)

A ship of foreign-built (American) belonging wholly to a *British* subject, and manned with foreign seamen, is not as within the 43d *Geo.* III, c. 153, entitled to import flax-seed from *Russia*.

A privilege given by Act of Parliament to ships belonging to any state in amity with his Majesty, and manned with foreigners, to import merchandize otherwise prohibited, does not extend to foreign-built ships belonging to British subjects, it being a privilege to be construed *strictissimi juris*.

Sed vide Campb. N. P. Rep. vol. 4, p. 364.

If a ship so importing, also bring into a British port other foreign articles, not importable as merchandize *as dunnage*, it is a question for the jury, to say whether such goods were fairly brought over as such.

Such vessels having an *English* mate on board, considered, notwithstanding, as being manned with foreigners, within the meaning of the Act.

1817.

ATTORNEY GENERAL v. WILSON.

The information consisted of eight counts. The seventh count, on which the present questions chiefly arose, was as follows:—' For that the said several parcels of flax-seed, the said several parcels of mats, the said several parcels of oars, the said several parcels of deal-ends, and the said several parcels of handspikes, being goods or commodities of the growth, production or manufacture of *Muscovy*, or some of the countries, dominions or territories to the Great Duke or Emperor of *Muscovy* or *Russia* belonging, were within the time aforesaid imported in the said ship or vessel called the *Jane*, by certain persons, to the said Attorney General at present unknown, from parts beyond the seas into *Great Britain*, to wit, to *Ratcliff*, &c. within the port of *London* aforesaid, by way of merchandize; the said ship or vessel, at the time of the importation of the said goods and merchandize, not being a ship or vessel *British* built, whereof the master and three-fourths of the mariners at least were *British*: nor being a ship or vessel of the built of that country or place of which the said goods and commodities were the growth, production, or manufacture, nor of the built of such port where the said goods and commodities can only be, or most usually are, first shipped for transportation, and whereof the master and three-fourths of the mariners at least were of the said country, place or places: nor a ship or vessel belonging to any kingdom or state in amity with his Majesty navigated by foreign seamen: contrary to the form of the statute in that case made and provided, whereby the said ship or vessel, with her

her guns, furniture, ammunition, tackle, and apparel, became forfeited.'

1817.

ATTORNEY GENERAL v. WILSON.

It appeared on the trial that the vessel in question had been *American* property;—that she had been purchased by the claimant, Mr. *Wilson*, a *British* subject, in the year 1809, and from that period had made several voyages to this country; some in the character of an *American*, and others under other flags; but she had not received, nor was she entitled (being foreign built) to receive, the character of a *British* ship, by being registered as such. The report of her, on the occasion of the present importation, was: 'In the ship *Jane*,—no register—foreign built—property all *British*—burthen about 400 tons, with sixteen men, being all foreign men, besides *Wm. Myers*, a *British* man, master for this present voyage from *Archangel*.' The report of her cargo was of—'a quantity of bags of flax-seed, and a quantity of mats, oars, &c. (as enumerated in the information) for dunnage.'

The points raised were, whether the vessel was entitled, under the 43d *Geo.* 3. cap. 153, § 4*, to import

* "IV. And be it further enacted, That from and after the passing of this Act, and during the continuance of hostilities, and until six months after the ratification of a definitive treaty of peace, it shall and may be lawful for any person or persons to import into the United Kingdom any sort of flax or flax seed, in any ship or vessel belonging to any kingdom or state in amity with his Majesty, his heirs or successors, navigated by foreign seamen, from any port or place whatsoever, upon the same terms and conditions, and subject to the same duties,

1817.

ATTORNEY GENERAL v. WILSON.

import flax-seed into this country—and whether, if she were, she might also import the articles brought here and reported to have been put on board for dunnage, being of the value of nearly 200*l.* and being therefore articles (as the Crown contended) rather of the quality of merchandize than dunnage.

The first question was reserved by the Lord Chief Baron as a pure point of law; and on the other, the jury found on the evidence, that the mats, oars, handspikes, and deal-ends, brought *bona fide* as dunnage, and were proper for that purpose, as some of the witnesses had stated that such articles would pack the cargo better than rough wood. There was also a third point made, which was, whether the ship could be considered as navigated by foreign seamen, the mate being an *Englishman*, which was also reserved.

Subject to the questions of law, the jury found a general verdict for the Crown, at the same time negativing all imputation of fraud on the part of the defendant.

duties, rules, regulations, and restrictions, in any respect as such flax and flax-seed would by any law in force in the United Kingdom, or in *Great Britain* or *Ireland* respectively, have been subject and liable to, if the same had been imported in foreign ships or vessels of the built of the country or place of which such flax or flax-seed was the growth, production, or manufacture; any thing in the said recited Act of the twelfth year of the reign of king *Charles* the Second, or any other Act or Acts of parliament, in force in the United Kingdom, or in *Great Britain* or *Ireland* respectively, to the contrary notwithstanding.

Carr

1817.

ATTORNEY GENERAL v. WILSON.

4th May.

Carr now obtained a rule on the points reserved, to show cause why that verdict should not be set aside and a new trial granted, or a verdict entered for the defendant; submitting, that although the vessel in question was confessedly a foreign ship, and not entitled as such to a *British* register, (*Long* v. *Duff* (*a*)); yet inasmuch as she was the property of a *British* subject, a merchant residing in *England*, she was to be considered (if not within the letter, within the policy of the statute) as belonging to a state in amity with his Majesty. And a case was mentioned (not then in print) of *Pearce* v. *Cowie* (*b*), wherein *Gibbs*, C. J. was stated to have held, that a foreign-built ship, the property of a *British* merchant, belonged to a state in amity with his Majesty within the meaning of this statute; and it was said that that decision had been followed up by a similar one of Lord *Ellenborough*, in a subsequent case. And he pressed the improbability of its being the intention of the Legislature to afford a commercial advantage to a neutral state, which it denied to its own; and that if it were matter of construction, it ought to be construed liberally.

The other minor question, it was contended, would depend on the fate of the preceding objection; for the word 'foreigners' in the act, related to the country of the ship, and in the present case *Englishmen* would come within the description of foreigners

(*a*) 2 Bos. & Pul. 209.

(*b*) Since reported in Campb. vol. 4, p. 364; and Holt, page 69.

1817.

ATTORNEY GENERAL v. WILSON.

25th May.

on that construction, even if the act should be held to mean that the whole crew must be composed entirely of foreigners.

Shepherd, Solicitor General, *Dauncey*, *Clarke*, and *Walton*, now showed cause. They objected to the authority of the case of *Pearce* v. *Cowie*, that it was merely a hasty dictum thrown out at *nisi prius*, without having undergone discussion, as it afterwards went off on another ground.

Then they contended, that as the present was a mere question of right between the Crown and the defendant, it must depend wholly on the words of the act, which, being passed to relax the provisions of an existing law, should be construed strictly. That would depend entirely on the question, whether a privilege conferred on a state in amity with another must necessarily be extended to the state itself. To show that the legislature had on many occasions observed a material distinction between the state itself and any other state in amity with it, (independently of the obvious and natural difference of the terms,) they adverted to the various sections of the statute of the 12 *Chas.* II, cap. 18, and of the present act, wherein that distinction was recognized, particularly in the 5th section of the latter, which gives a privilege to import in ships built in or belonging to *Great Britain*; *or*, belonging to any state, &c. in amity with his Majesty.

As to any supposed absence of policy or legislative intention,

intention, or any existing hardship in so confining the operation of the act to the letter, they submitted that that was a matter which this Court could not take into their consideration, in deciding what was the true construction of it, as it affected this case. To take the words in their common acceptation, they contended that a state in amity with his Majesty, could not by any construction be made to mean any part of his Majesty's dominions; nor can a subject of his Majesty be the subject of a state in amity with his Majesty. The distinction is sufficiently marked by the criterion of the duty of allegiance; but a still more forcible test would be found in this,—that one might commerce with an enemy of the other state without being guilty of any breach of his duty to the sovereign. A distinction equally marked (they submitted) existed in terms between a state,—a state in amity,—and a state in hostility; and in a question of designation, a state was as distinct from a state in amity with it, as from a state in hostility: and as well might both the others be included in the terms of a positive enactment by a statute relating to one of them expressly, as either. Therefore it cannot be contended that an act, speaking of a state in amity with *Great Britain*, may be said to include *Great Britain* itself.

The other question, they admitted, was much less important; but they insisted, that if it were cause of forfeiture that all the seamen on board this ship were not foreigners, this vessel was clearly forfeited

1817.

ATTORNEY GENERAL v. WILSON.

forfeited on the evidence*; for *Myers* was not, in fact, the master of the ship, as reported, but the mate, and as such nothing more than one of the mariners: for in commercial law there is no distinction recognized between the crew on board, but that of master and mariner, therefore *Myers*, a *British* man, being a mariner on board the commercial ship, she was not manned by foreigners, as required by the act; and therefore the importation was on that ground also illegal. It was the object of the act of parliament to prevent *British* seamen from being so engaged when wanted for the service of *Britain*; it was therefore the defection of *British* seamen that the act contemplated, and it ought to be strictly enforced. But if on the other hand this vessel has made the importation as a *British* ship, it is enacted, that in such case the master and three-fourths of the crew shall be *British*, and that unquestionably is not the fact. If the construction contended for by the defendant were the true one, the consequence would be that a foreign-built ship, *British*-owned, would be entitled to greater advantages as a trader, than a vessel belonging to and of the built of this country. On the whole, they submitted, that this Act of the 43d of the King could not be construed so largely as to extend the privilege to a *British*-owned ship; for if it could, it must necessarily include such vessels

* It was proved that a man of the name of *Bowes* (an *American*) had had the command of the vessel from *Archangel* till she came to *Woolwich*; he, it was said, was then superseded, which turned out to mean, that *Myers*, who had acted as mate during the voyage, was sent, as the captain of the ship, to report her.

even

even when of the built of a hostile state and navigated by enemies; and that therefore it could not have been the intention, any more than it was the language of the legislature, that such a construction should be put upon the words of the statute.

Carr, and *Spankie*, for the claimant, having adverted to the testimony borne by the jury to the fairness of his conduct in the transaction, submitted the following arguments, on the point of law as to the construction of the clause of the Act in question, which, they contended, enabled the defendant to effect the importation which gave rise to this proceeding:—That the legislature having thought it expedient to relax, in particular instances, the prohibitory enactment of the general navigation law in favour of the trading subjects of alien neutral states, it was impossible to conceive that it was their intention to exclude from those valuable privileges the numerous class of *British* ships belonging to *British* merchants, of which this vessel was one; and that every fair and ostensible object of the statute could not but be noticed by the Court in coming to a conclusion on the construction of it, as regarding the important question before them.

They submitted, that the case of *Long* v. *Duff* (c) had established, that a *British*-owned vessel of alien built, which is neither required or entitled to register as a *British* ship, is entitled to trade in as ample a manner as any alien ship admitted to specific privi-

(c) 2 B. & P. 209.

leges

1817.

ATTORNEY GENERAL v. WILSON.

leges by act of parliament. The language of Lord *Eldon* on that point is, 'Though it was highly politic to confine the privileges of *English* ships to such as should be registered, there seems to be no reason why *English* owners should not be entitled to carry on foreign trade under the same advantages as foreigners, and liable to the same duties;' and, in the conclusion of his judgment, his Lordship says, —(having cleared the proposition from any doubt as to ships not registered being lawfully navigated or owned by *British* subjects,)—' a *British* owner of a foreign-built ship may engage in neutral trade, and will be liable to the alien duties, but it was not the policy of the legislature to prevent *British* subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens.' And they denied the existence of any statute wherein higher privileges were given to the foreign trader than to this class of ships, except in the single instance, where the nature and necessity of the thing required it, which is to be found in the navigation act, of the power given to foreign merchants, to import the produce of their own state in ships of the built of that country, and navigated by subject seamen. There could be no doubt, (they submitted,) that if the claimant had employed a ship belonging to a neutral state to have imported this cargo, it would have been legal. Then the question is, whether the description in the statute, " of a state in amity with *Great Britain*," may not be extended to mean a state not at war,—any state but an enemy,—and if not as being comprehended in the words, at least on the reasoning principle of *à fortiori*. The true distinction

distinction appears to be, that these ships are not entitled to the privileges of *British* registered ships, —they are not entitled to the colonial trade,—or to drawbacks, in certain instances—and they are liable in many instances to a higher rate of duties on their cargo, as is the case with alien friends; but while they are subject to the same disabilities as alien neutrals are, are they not to be admitted to the same advantages?

They then recurred to the case of *Pearce* v. *Cowie*, where this same question of—whether a subject of this country was a subject of a state in amity with his Majesty—was raised, in an action on a policy of insurance. There the Chief Justice of the Common Pleas said, he should consider this sort of ship as belonging to an alien friend within this Act; and that decision, they stated, had been followed by a recognition of that construction by Lord *Ellenborough*, who, on a subsequent similar question on the same policy, (*Pearce* v. *Glover*, Sittings K. B. M. 15 G. 3, not reported,) said, on the point being raised, 'It will be difficult to make me believe that a *British* subject is not a subject of a state in amity with his Majesty;' and the objection was overruled. That at least shows what was the first impression of those two very learned Judges. In the case of *Sewell* v. *The Royal Exchange Assurance Company* (*a*), the Court of Common Pleas held, that a ship of the built of a hostile country, purchased with license by a *British* owner,

(*d*) 4 Taunt. 856,—noticed at length *infra* in the judgment.

was

1817.

ATTORNEY GENERAL v. WILSON.

was to be considered as an alien ship, so as to legalize an importation permitted to be made in ships belonging to a country in amity with his Majesty. The judgment given in that case, in favour of the plaintiff, must have proceeded on that ground entirely, for the other points of the case are against him; and he could not have succeeded, unless his ship had been held to be a ship belonging to a subject of a state in amity with his Majesty, for by that description alone could she have been capable of receiving a license to legalize the voyage.

They submitted, therefore, that in a case of construction of a beneficial statute, passed in relaxation of a more rigorous law, for the purpose of granting privileges of commercial advantage to neutral ships, not for the benefit of the neutral but of the *British* nation, the Court would, in a case of doubt, decide in favour of the *British* trader,—that an alien's ship, belonging to a *British* owner, would be entitled to any privilege conferred by such a statute on subjects of states in amity with *Britain*.

On the other point, they submitted, generally, that a provision requiring a ship to be navigated by foreigners, would be satisfied if the body of the crew, or even the greatest proportion, were foreign seamen; and that it would be most hard if the circumstance of *Myers* being on board the ship, even admitting that he was not the captain, but one of the seamen, should cause the ship to be forfeited. And they cited the case of *Scott* v. *Schawrtz (b)*,

(*e*) Com. Rep. 677.

to

1817.

ATTORNEY GENERAL v. WILSON.

to show that great latitude of construction was permitted in deciding on those penal statutes, which subjected to forfeiture ships not navigated by foreigners within the letter.

27th May.

The *Solicitor General* was heard in reply. He insisted that the case of *Sewell* v. *The Royal Exchange Assurance Company*, was a decision altogether *diverso intuitu*, and proceeded wholly on the words of an act (49 *Geo.* III.) which permitted such importations, under certain circumstances, "in any "*British* ship or vessel, or in any ship or vessel "belonging to any country in amity with his "Majesty, in any manner navigated;" and the question there was merely, whether a *British* owned ship, purchased under a license, from an enemy, was protected within that statute. He contended, that the description of a state in amity with his Majesty could not be applied to any state which might not at some time by possibility become hostile, and that alone must exclude the notion of such terms being applicable to the state itself. He also put the case of a ship warranted neutral as to *Britain*, in a policy of insurance, turning out to belong to a *British* subject, and that he submitted would vacate the policy. A neutral may trade with a belligerent, whereas a subject may not. The main object of the distinction taken between a *British* registered ship, and a ship of foreign built *British*-owned, is the encouragement of the former, to the disadvantage of the latter, according to the policy of the state; and that was recognized in the case of *Long* v. *Duff*. This very act makes that clear; for the 16th section enables ships

1817.

ATTORNEY GENERAL v. WILSON.

ships belonging to states in amity with, to import merchandize into, this country, under an order in council, from any ports belonging to states not in amity with his Majesty; which evidently was not meant to extend to ships belonging to this country.

Cur adv. vult.

THOMSON, *Chief Baron*, now gave judgment.

This case of the *Attorney General* v. *Wilson*, has been a matter of great importance, and has received, as it well deserved, the full consideration of the Court. *(Here his Lordship stated the information, and the questions arising out of it.)*

The cargo, in the present instance, was a quantity of flax-seed, and also, as the information alleged, a quantity of mats, oars, deal-ends and handspikes; but upon the merits, the question must be taken upon the importation of flax-seed only, that being now to be considered as the only cargo thus imported, because, upon reference to the jury, with respect to the nature of the other articles alleged to have been imported, they found that those articles were fairly and *bonâ fide* what were properly denominated dunnage, that is, that they were things fit and necessary and usually taken on board for the protection and safety of a cargo of flax-seed when brought home in bulk. *(His Lordship then stated the circumstances of the case.)*

Now it is plain, that this is not a ship so owned and

and navigated, as to be entitled to make such an importation under the regulations of the acts of navigation. If, therefore, she was authorized to do so, it must be under the statute of the 43 *Geo.* III. c. 153, s. 4. *(His Lordship read the section.)* That section is supposed to convey a right to this ship to make the importation, which she has done in the present instance, that is, as a ship belonging to a kingdom or state in amity with his Majesty, navigated with foreign seamen, notwithstanding the Navigation Act, or any subsequent statute made upon this subject. So that if this statute authorizes the ship in question to make the importation, it can only be by construing that ship to be one coming within the description of 'a ship belonging to a kingdom or state in amity with his Majesty;' and the ground of the argument upon that is, that it is a ship belonging to a kingdom or state in amity with his Majesty, because it belongs to a person who is a subject of his Majesty. But do not the terms "ship or vessel belonging to a kingdom or state in amity with his Majesty," in their plain acceptation, necessarily refer to some kingdom or state while in a friendly relation to this country, and such a state as may hereafter become hostile to this kingdom, and not to the ships of individuals who compose part of the body of the subjects of this kingdom?

The title of this act of the 43 *Geo.* III. seems to me not immaterial to be attended to; that title is, An Act to permit the importation in neutral vessels from states in amity with his Majesty, of certain merchandize;

1817.

ATTORNEY GENERAL v. WILSON.

chandize; and to permit the importation in neutral vessels from states not in amity with his Majesty, of certain merchandize.

The provision in the 4th section, with regard to flax-seed, it must be admitted, does not confine the *place* from whence the importation is to be made, to states in amity with his Majesty, but on the contrary, allows it from any place whatsoever; still, however, with regard to *the vessels* allowed to be employed in that importation, the description of them is this, namely, that they must belong to a kingdom or state in amity with his Majesty. If these terms were doubtful, they might fairly receive elucidation from the title of the act, which declares the purpose of it to be, to permit the importation in *neutral vessels*; explaining, therefore, what they mean by neutral vessels, namely, vessels belonging to a neutral kingdom.

The 5th section of the same statute, with regard to the *Turkey* Trade, plainly marks the distinction between ships belonging to *Great Britain*, and ships belonging to a state in amity with *Great Britain*, by allowing the *Turkey Company* "to import goods, heretofore imported by them from the *Levant*, in any ship or vessel built in or belonging to *Great Britain* or *Ireland*, navigated according to law," that is, of course, on board of which you are to have a certain proportion of sailors of this country; "or in any ship belonging to any kingdom or state in amity with his Majesty;" thus marking a clear dis-

h

tinction

tinction between ships belonging to *Great Britain* or *Ireland*, or ships belonging to a kingdom or state in amity with his Majesty.

The Court was much pressed with the hardship of a *British* subject, who is possessed of a ship, his own property, not being permitted to employ it in importing the articles in question, under the same regulations, with respect to the navigation of such ships, as foreign ships are laid under, when employed by him, as they lawfully may be, in the same importation; and it must be admitted, it does bear some appearance of hardship; but at the same time, if we find it a matter of positive and precise regulation, I do not know how the Court can prevent the operation of that regulation. Many regulations on these subjects of revenue, not merely relating to the customs, but to the excise, and others, may proceed from considerations of state policy, of which we do do not, perhaps, see the reason; but if they are positively laid down and marked out, the Court cannot say that they shall not take place on the ground of hardship.

Circumstances of hardship in particular cases, no consideration in the construction of the navigation or revenue laws, or such statutes as are founded on reasons of state policy.

I cannot find any case which has yet decided in favour of the construction of these statutes, which the defendant contends for; and when I say decided, I do not find any case in which the question has come in judgment before the Court. It was certainly stated, that some expressions had fallen from very high authority, tending that way. There was a case cited of *Pearse* v. *Cowie*, tried before Mr. Justice *Gibbs*, which was relied on for the sake

1817.

ATTORNEY GENERAL v. WILSON.

of something which he let fall to that effect, upon the trial of that cause: it happens that that case has since appeared in print, but I do not find that the report of it warrants the purpose for which it was cited *.

That case is in Mr. *Holt*'s Reports, p. 69. It was an action on a policy of insurance on a *Portuguese* vessel, owned by a *British* subject, at and from *Amelia Island* to *Liverpool*. The vessel took in her cargo at *Amelia Island*, which, with the exception of some small quantity of rice on board, consisted of cotton. The ship, on account of bad weather, was obliged to put back to *Amelia Island*, where she was found to have sustained so much damage, that it became necessary to sell her. The plaintiffs claimed a total loss. The objection there was to the legality of the voyage, because the 43 *Geo.* III. cap. 153, sec. 13, only authorized the importation into *Great Britain* of *all sorts of wool*; and it proceeds to give a liberty to import into *Ireland* all sorts of barilla, *and wool, and cotton wool*,—so that there was an obvious distinction made by the legislature. The bulk of that cargo was cotton wool, and not the wool which the act of parliament permits to be imported into *Great Britain*; and it was urged, that wool standing alone, means wool from the backs of sheep, and not cotton wool. The Lord Chief Justice *Gibbs* was of opinion, that cotton wool was not included in the term wool, in the act of the 43 *Geo.* III.; and, therefore, there being a dis-

* His Lordship appears not to have seen Mr. Campbell's Report of that case.

tinction

tinction between wool with regard to *Ireland*, and all sorts of wool with regard to *England*, he held that the words of the act did not authorize the importation of cotton wool into *England*. Now that case seems not to bear on the present question; for the question was not there, whether a foreign-built ship, owned by a *British* subject, could be said to belong to a subject in amity with his Majesty, for if the ship had belonged to a neutral subject, she could not have imported cotton-wool, but wool only so called; therefore, it seems to me, for the reason I have mentioned, that this point was not considered *(f)*.

There was a case, much relied upon, too, on the part of the defendant, of *Sewell* v. *The Royal Exchange Assurance Company*; and certainly there does seem to have fallen, according to the report, from Lord Chief Justice *Mansfield*, something that appears to bear upon this question; but still, that was not the point in judgment there. There was a policy of insurance upon a ship and her freight, at and from *St. Michael's* to *London*, and the declaration set out a charterparty, whereby the agent for the plaintiffs chartered the ship to *Browning*, for a voyage from *London* to *St. Michael's* and back again, upon the terms that the master should proceed direct to *St. Michael's*, and on her arrival receive there from the factors of the freighter a full cargo of fruit, and proceed therewith direct for *London*. The loss averred was by a forcible seizure and

(f) Vide the dictum in the report of that case, in 4 Campb. p. 363.

capture

1817.

ATTORNEY GENERAL v. WILSON.

capture by persons unknown. The cause was tried at the sittings after *Trinity* Term 1812, before Mr. Justice *Gibbs*, and then it appeared that the ship was Norwegian built, and had been purchased by the plaintiffs of the master, who was a subject of *Denmark*, a country then hostile, under a license from his Majesty to purchase of an enemy; the Captain and crew were Danes; that was the state and situation of that ship. On her arrival at *St. Michael's* the governor refused to let her enter the port, or receive a cargo there, and ordered the master to proceed to *Tercera*, where the *Portuguese* governor general resided, to obtain permission to land at *St. Michael's*; this the master refused to do, assigning as his reason, that it would be a violation of his charterparty; and he intended to lie in the harbour during the stipulated time for his taking in a cargo, but was soon after arrested by the governor, and detained four months a prisoner, and a *Portuguese* pilot, master, and crew, were put on board his ship, who took her to *Tercera*. In point of fact, they then laid hold of his property, and in substance, confiscated his ship. The action was brought upon the policy, and it was contended, that the plaintiff could not recover on the homeward policy; because, under the Navigation Act, requiring three-fourths of the crew to be *British* subjects, it was illegal to import a cargo of fruit from *St. Michael's* into *England* with a *Danish* master and crew. It seems she had not proceeded at all upon her homeward bound voyage, for she was interrupted and intercepted in that by the act of the foreign governor, and the objection taken was, that since the charterparty, which was in evidence, proved that

that the voyage from *London* to *St. Michael's* and thence back to *London* was one and entire, the illegality vitiated as well the policy on the outward voyage as the other; that was the great line of objection then taken upon the trial. There was a motion then for a new trial; and Mr. Justice *Gibbs* laid it down, that he had no doubt that the homeward voyage did not contaminate the outward voyage;—the great stress of the argument was to make this one entire voyage,—that is, both the voyage out and the voyage home;—and that if the voyage had been completed under those circumstances, it would have been an illegal voyage. Upon the conclusion of the argument, Lord Chief Justice *Mansfield* said, "We think that the ground taken by the defendant fails, and that the homeward voyage is not necessarily an illegal voyage; the vessel is clearly not entitled to the privileges of a *British* ship, but is to be considered as an alien ship,"—(it had been argued that if she was not entitled to the privileges of a *British* ship, she was to be considered as an alien ship,)—"and as such she could not come to *England* with the cargo in question, were it not that by the 49th *Geo.* III. the king had power to license ships to trade directly contrary to the Act of Navigation, that is, to authorize alien ships to bring home this sort of cargo." That was Lord Chief Justice *Mansfield's* opinion of the operation of that act, but the question in that case turned entirely on the authority of licensing alien ships; nothing, however, of that sort appears in the present case: this is not a question of license. The opinion of the Chief Justice proceeded thus, "*Non constat* that this captain

1817.

ATTORNEY GENERAL v. WILSON.

captain would have performed this voyage without obtaining such a license. If there were any officer in the *Azores* authorized to grant it, the master might obtain it there, if not he might wait till such a license was sent to him from *England.*" The Chief Justice was of opinion, that by the 49th of the King, and subsequent to that act, on which this arises, it was in the power of the King to license ships to trade directly contrary to the Act of Navigation; and he says, "it was not necessary to obtain the license till just before the act of importation; it does not refer to the act of sailing over, but to the bringing in the goods:" therefore they were of opinion that the rule ought to be discharged; dividing therefore those two voyages, *non constat* that the ship would have come home without a license; the Chief Justice being of opinion it might be obtained. It seems to me, therefore, that regard being had to the points before the Court in that case, that decision is not applicable, in point of determination, to the question now before us.

There was another ground taken on the part of the Crown for the forfeiture of this ship, and when I say taken, I do not mean that it was strongly insisted upon, but it was urged—that this ship was not properly navigated;—for, supposing she could, under the description of a ship belonging to a kingdom or state in amity with his Majesty, be entitled to import, still she must be navigated by foreigners. That is a qualification necessarily imposed; and there was a little confusion created by some attempt upon the entering of the ship here, by the person, who really

really was the captain, to make the mate appear as if he was the captain: I do not impute that to the owners, it was the act of the captain, who made the mate report himself as being the captain, which was not the case; but, independent of that, there was not the least evidence to show that there was not a sufficient number of foreigners on board, in order to make out the requisite of her being navigated by foreign seamen; certainly, one *English* sailor on board her would not vitiate the voyage, provided the majority were foreigners, as the statute requires; indeed, in candour, I think the Solicitor General did not insist on that objection, but wished to have the opinion of the Court upon the dry question, whether this ship, allowing her to be well navigated, was entitled to protection under the 43d *Geo.* III. Now, upon the best consideration we can give the statute, we think it is a question certainly, *strictissimi juris*, and therefore we think that she does not come within the protection of the statute, as belonging to a kingdom or state in amity with his Majesty. At the same time I feel, and I may state it to be the feeling of the rest of the Court, that it is a case of extreme hardship on the defendant; for there does not appear to have been any thing dishonest or fraudulent in the transaction on his part; and it is clear that he might legally have hired any other vessel for the purpose of this importation, and if she had been manned by foreigners, as required, she would certainly have been protected from forfeiture; but that, however, has not been done.

We wish the case had not proceeded to that ex-

 tremity,

1817.

ATTORNEY GENERAL v. WILSON.

tremity, which called for the judgment of the Court on the point; we cannot help thinking it worth the attention of the Crown officers on this subject, how far they will think proper to pursue further the consequences of that judgment, which we feel it our duty to give, for the forfeiture of the ship, under the counts on which this verdict has been obtained.

16th *January.*

The KING *v.* BICKLEY and others.

The inquisition to find debts, &c. on an extent, is not wholly an *ex parte* proceeding; and a claimant of property in the goods enquired of, may assert his claim before the Sheriff, and put material questions to witnesses examined by him on the part of the prosecutor, in the way of cross examination, to show that the goods belong to him. And if the Sheriff refuse to permit such interrogatories to be put, the Court will set aside the extent and inquisition.

Quære, Whether a claimant is entitled to bring forward other evidence in support of his claim.

THIS was a motion to set aside an Extent, as to certain property which had been seized under it, on the ground that the Sheriff, on taking the Inquisition to find what goods, &c. the defendants were possessed of at the time of the Extent, had in the schedule thereto returned the property in question as of the goods of the defendants; and had refused to receive, on the occasion of that enquiry, certain evidence offered, to show that they were not their property but belonged to the claimants on whose behalf the motion was made; and that he had refused to put to the defendants, on their examination, certain questions proposed on part of the claimants with the same view.

The

1817.

The KING v. BICKLEY and others.

The Extent was issued against the defendants, who were merchants at *Bristol*, at the instance of *Brown* and Co., bankers at *Bath*; and by the Inquisition taken thereon, the jury had found that the defendants were possessed of 226 hogsheads of sugar, which were then seized by the Sheriff. On that Inquisition the claimants, *Maze* and Co., merchants at *Bristol*, attended by counsel, for the purpose of showing that the sugars were in fact their property, setting up a title under the bills of lading, which were endorsed to them, against the *primâ facie* right of the defendants, who were the consignees. But the Sheriff refused to permit the bills of lading to be laid before the jury, or any questions to be put to the defendants as to the property.

Copley, Serjeant, obtained a rule last term, calling on the prosecutors of the Extent, and the Sheriff of *Bristol*, to show cause why the writ of Extent and Inquisition should not be set aside as to the seizure of the sugar, on an affidavit made by *Maze*, which stated, that considerably before the issuing of the Extent, the defendants had indorsed the bills of lading of those sugars which had arrived in the port of *Bristol*, consigned to them from *Trinidad*, jointly to the claimants, for a valuable consideration; and that the sugars had been accordingly thereupon discharged from the vessel into the warehouse of a cooper, appointed by the deponent and his partners to receive the same, in their names; and that they had in fact never been in the possession of the defendants, the *Bickleys* and *Wilcox*:—that on the taking of the Inquisition,

1817.

The KING v. BICKLEY and others.

the prosecutors of the Extent attended by counsel, and proved, generally, by the evidence of the defendant *Wilcox*, that the sugars had been consigned to them the defendants, which was the only evidence produced of any interest or property of them therein: —that the said bills of lading, so indorsed to *Maze* and *Ricketts*, were tendered in evidence by their counsel, who, at the same time, proposed to the defendant *Wilcox* the following question: "Were the sugars, specified in these bills of lading, ever in the possession of the defendants, and are they the property of the indorsees, *Henry Ricketts* and Co. and *Peter Maze*?" but that the Under-sheriff would not allow the said question to be put, or the said bills of lading to be given in evidence;—and that he also refused to hear the deponent's counsel on the merits, or to receive any evidence in support of the said indorsee's title to the property of the said sugars; and that thereupon the said Under-sheriff directed the jury to find a verdict for the Crown in respect of the same, which they accordingly did.

On those facts it was contended that the Inquisition was irregular, and they cited the case of the *King* v. *Bulley* and *Blommart (a)*, as an authority, showing that a stranger claimant, had a right to attend on such occasions to assert his claim, and support it by evidence, to rescue his property from seizure, and obviate the mischief of such a proceeding, without the expense and delay of a *traverse*.

(a) Bunb. 233.

Dauncey,

1817.
The KING
v.
BICKLEY
and others.
19th December.

Dauncey, and *Nolan*, now showed cause. They urged that an Inquisition was altogether an *ex parte* proceeding, as appeared from the constant and uniform practice in such cases, and one of which no notice to the party to be affected by it was necessary to be given, *Lilly's Pr. Reg.* 630:—that the claimant might traverse the inquisition, and that that was the proper and only course of proceeding in such a case; or he might try his right by bringing an action against the Sheriff for wrongfully seizing the goods. On the other hand, they submitted, that if the evidence which had been proposed was to be received by the Sheriff on such occasions, and the jury should find against the Crown, the latter had no remedy, since no other writ could issue.

That the practice had always been, to consider the proceeding by inquisition as an *ex parte* proceeding entirely, and therefore such counter evidence had always been excluded, a practice now too long established to be overthrown by a single case of doubtful authority to the contrary, (*Rex* v. *Bulley* and *Blommart*;) some of the principal grounds of which decision no longer existed now, for it was no longer required that security should be given before plea: nor was it true, that the party has no remedy if aggrieved by the return. And they observed, that the minute book had been searched, and though the order for quashing the inquisition was found, yet that the ground upon which it proceeded did not appear.

Copley, Serjeant, and *Gifford*, in support of the

1817.

The KING v. BICKLEY and others.

rule, contended,—that from the terms of the mandatory part of the writ,—from the tenor of the language of all the various statutes by which inquisitions are directed to be publicly taken, in all of which the Sheriff is directed to hear witnesses;—and from the very object and manner of taking it, the inquisition clearly could not be considered an *ex parte* proceeding. They adverted to the words of the writ, and to the statutes, particularly the 1 *H.* VIII. cap. 8, which, by section 2, enacts, "that very escheator or commissioner shall sit in *open* or convenient places, according to the statutes heretofore made; and the said escheators and commissioners shall *suffer every person* to give evidence openly in their presence:" and submitted, that all tended to show that it was the duty of the Sheriff so to proceed in enquiry, as should conduce to the developement of the truth of the matters to be enquired of, without regard to the single inconclusive object of fixing a *primâ facie* title in the debtor, merely to be further agitated by ulterior proceedings; and if an effectual investigation may be had in the first instance, it would be hard to preclude a party interested from the advantages of it. Nor could the Crown be damnified, for a re-investigation might at any time be set on foot by the writ of *melius inquirendo* *, in case the jury should have come to a wrong conclusion, (citing *Ex parte Duplessis*) *(b)*. In the case of *Doe* v. *Redfern* *(c)*, the witnesses for the Crown

* Fitz. Nat. Brev. 255. (p. 572.)

(b) 2 Vez. 538—542. *(c)* 12 East, 96.

were

were cross-examined, and other witnesses adduced, by the party who was to be affected by the inquisition.

As to the argument drawn from the practice, they contended that that proved nothing, since though it might not have been usual to offer such evidence, yet no case could be produced in which such evidence had been offered and rejected, and such rejection approved by the Court. But the case of *Bulley* v. *Blommart* (they insisted) was decisive on the point, and there was nothing in the books to impeach that case, which appeared to have been much considered, and is reported with unusual minuteness and circumstance, (and it was confirmed (they observed) by a book of MS. notes*, on the subject of Extents, which was tendered by them to the consideration of the Court,) and there the right of a claimant to examine witnesses was clearly established by the authority of the opinion of the Court, and that notwithstanding former practice.

If it were not permitted to a party who claimed property seized under an Extent, to produce witnesses to prove his property in them, it would be unjust and hard in the extreme. Suppose the defendant to be in possession of lands, as tenant at will, or from year to year, and the prosecutor of the Extent, to prove that he was in possession of these lands, which would be *primâ facie* evidence of seisin in fee, could it be contended that it would not be

* The Book, said to have been commended by the Court in the case of the *King* v. *Babb*.—*Hughes's Rep.* p. 53.

1817.

The KING v. BICKLEY and others.

competent to the landlord to prove that the defendant held the lands merely as his tenant? The question is in fact, not whether a claimant may produce witnesses of his own to the Sheriff to be examined on his behalf, but, whether a witness already under examination may not be cross-examined;—whether such a witness must tell all he knows, as if a book, or other documentary evidence were produced, and the Sheriff should admit a part of it and refuse to receive the rest.

Dauncey, in reply, distinguished the case of the *King* v. *Bulley* from the present, by the circumstance in proof, and much relied on there, of the Sheriff having been guilty of shuffling and evasion, and other gross misconduct and wilful partiality, in procuring the inquisition to be taken clandestinely; whereas no such thing had been suggested in this case, where the Sheriff's conduct was not in other respects complained of. He admitted that a claimant had a right to be present at the holding of such an inquisition, and that it ought to be open, but contended that he had no right to interfere, either by examining witnesses himself, or cross-examining those produced by the prosecutor, which would necessarily be productive of the utmost confusion; as, if any one should be entitled to do so, there could be no limit to the discussions which might be set on foot by any number of claimants, perhaps to the total hinderance of the taking the inquisition, and that was the reason why such a proceeding was altogether *ex parte*. And he ultimately submitted, that if it had been permitted, as stated in

in the case in *Bunbury*, the subsequent constant uniform usage showed that that practice had been since altered.

Cur. adv. vult.

THOMPSON, *Chief Baron*, now delivered judgment.

(Having stated the case, his Lordship proceeded.)—The inquisition has returned certain sugars to be the property of the person against whom the extent in aid was sued out. The application made is to set aside this inquisition, upon the ground of the Sheriff having misconducted himself, in refusing to receive the evidence to show that these sugars were the property of a person of the name of *Maze*, who attended upon the execution of this inquisition. The affidavit states, that the sugars were imported by a ship called the *Suffolk*, from the island of *Trinidad*; and that a considerable time before the issuing of the Extent, the defendants had endorsed the bills of lading to the deponent (that is, *Maze*) and his partners, Messrs. *Ricketts*, jointly and severally, for a valuable consideration; and that the last-mentioned sugars were accordingly thereupon discharged from the vessel into the warehouse of the cooper, appointed by the deponent and Messrs. *Ricketts* and Company to receive the same in the names of the indorsers, and have in fact never been in the possession of the defendants. And he further states, that by virtue of this Extent, an inquisition was taken on the 26th of *October*, before the Undersheriff, at which the deponent, on behalf of himself and

1817.

The KING v. BICKLEY and others.

and his partners, Messrs. *Ricketts* and Co. attended by himself and his counsel; and Messrs. *Brown* and Co. also attended in like manner; and that it was proved by the evidence of the defendant *Michael Willcox*, that the said sugars were consigned to them the defendants, which was the only evidence produced of any property of the defendants in the sugars, it not appearing for whose interest, but merely that they were consigned to them. And the deponent also states, that the bills of lading, so indorsed to him and the said Messrs. *Ricketts* and Co., were tendered in evidence by their counsel, who at the same time proposed (and this was tendering evidence) on the cross-examination of the witness produced on the other side, to the defendant *Willcox* the following question, upon the inspection of these bills of lading, in the nature of cross-examination,—"Were the sugars, specified in these bills of lading, ever in the possession of the defendants, and are they the property of the indorsers, *Henry Ricketts* and Co., and *Peter Maze*?" It certainly seemed a very material question for the witness to have answered, but the affidavit states that the Under-sheriff would not allow the question to be put, or the bills of lading to be given in evidence in any way.

The question here is really upon this point, and it may be decided upon this point simply: that here the evidence of the cross-examination of a witness on the other side was refused, upon a question in what light the goods were consigned, and whether the consignees ever had possession of them? The

bills

bills of lading were produced to show that these were the same sugars, but the question was, "Were they ever in the possession of the defendants?" and the Sheriff would not allow that to be put.

It is not, I believe, very usual, in point of practice, to have these inquisitions, which are stated to be *ex parte* proceedings, much attended to; but there is no reason why the parties may not attend them, and why they ought not to be allowed to propound all such questions to the witnesses as may be deemed necessary to prove the property in others than the defendant. And the case of the *King* v. *Bulley* and *Blomart*, which was much relied on, is of great weight: indeed it is directly in point; but it is one which I never heard of (so little has it ever been acted upon,) till it was cited upon this occasion. There, the Court held, that a witness should be examined to prove the property; it does not appear there that there was any refusal to cross-examine the witnesses; but here, there is the additional circumstance, that the cross-examination was refused. It was laid down that the writ of Extent was a right in the King, not at common law, but given by the statute of *Henry* VIII.; and the learned person who stated that, said, that he himself had attended inquisitions on elegits and outlawries. Undoubtedly, this is a very strong authority, and it seems to have with it all the reason of the thing; for, as it was stated in the argument, had this case been then entered into, the expense and trouble of traversing the inquisition would have been avoided. And it seems to be no answer that you may plead the claim;

1817.

The KING v. BICKLEY and others.

claim; for meanwhile, irreparable injury may be done, when, if the evidence had been suffered to proceed, and had the questions proposed been allowed to be received, it would have shown the truth of the matter. It seems to us, therefore, that this is an irregular proceeding, and the inquisition must, for that reason, be quashed. It will not, however, I take it, preclude the taking another inquisition on a new writ of Extent of the teste of the one now quashed.

GRAHAM, *Baron.*—I agree with the *Lord Chief Baron*, that the Sheriff did wrong in not either propounding the question, or suffering it to be put; but I do not adopt the case in *Bunbury*, however high the authority may be, as deciding the other point.

THOMPSON, *Chief Baron.*—There is quite enough here without that.

Per Curiam.

Rule absolute.

1817.

KINGSMILL *v.* BILLINGSLEY and others.

Thursday, 16th January.

[Of lands exempt from tithes under the 2d and 3d *Edw.* VI.]

Where the defendants set up, to a bill for tithes, a claim of exemption under the 2d & 3d *Edw.* VI. cap. 13, and produced much evidence of the land in question requiring to be cleared and levelled, and that it gave more than usual trouble in ploughing, and cost more than the customary expense in manuring it with lime; the Court ordered an issue, to try whether the lands, of which the tithes were demanded, "were of such a nature "as (exclusive of the labour and expense of clearing the same from furze or whins, "and preparing the same for ploughing) necessarily required extraordinary ex- "pense of liming and manuring, or labour, to bring them into a proper state of "cultivation."

THIS was a suit instituted in this Court by the plaintiff, (who, by his bill, stated himself to be seised of the impropriate rectory of the parish of *Chewton* in the county of *Somerset*, and entitled to all the tithes of corn, grain and hay, and all other prœdial tithes,) against the defendants, landholders and occupiers, for the tithe of corn and other grain, and hay, produced on certain newly enclosed land, being part of lands called *Chewton Mendip*.

The defence set up by the answer was, that the said lands were exempt from tithes under the 2d and 3d *Edward* VI, cap. 13, sections 5 and 6*, as

* "Provided always, and be it enacted by the authority aforesaid, That all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of parliament, which before this time have lain barren and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same; any thing in this Act to the contrary in any wise notwithstanding."

"Provided

1817.

KINGSMILL v. BILLINGSLEY and others.

being barren and waste grounds. And the defendants respectively stated,—that the several closes, from which the tithe was claimed by the bill, were part of the forest of *Mendip*, and which had been sold to the Earl of *Waldegrave*, by the commissioners under an Act, passed in the 37th of the King, "For inclosing the open commons and waste lands within and adjoining the township of *Chewton Mendip*;"—and that the defendants, who occupied the said lands, had cleared and levelled the same, and ploughed and manured them with a large quantity of lime at a considerable expense, and sowed and reaped, cut and carried away, wheat and oats, and grass seed, during the time for which the tithes were sought by the plaintiff;—that some parts of the said lands had not been limed, but had been merely dunged and sowed with oats, and that they produced invariably a poor crop; whereas the parts which had been limed produced a good fair crop. And all the defendants said, that the manner in which they began to cultivate the said lands, so newly inclosed and occupied by them, was, by inclosing and clearing the same from stones, filling up the pits therein, and levelling the same by ploughing it twice; letting it remain in fallow for many months, and manuring with lime; laying a

"Provided always, and be it enacted by the authority aforesaid, That if any such barren, waste or heath ground, hath before this time been charged with the payment of any tithes, and that the same be hereafter improved or converted into arable ground or meadow; that then the owner or owners thereof shall, during seven years next following from and after the same improvement, pay such kind of tithe as was paid for the same before the said improvement; any thing in this Act to the contrary in any wise notwithstanding."

great er

1817.

KINGSMILL v. BILLINGSLEY and others.

greater quantity of manure, and at a much greater expense, for the purpose of bringing the lands into a situation to produce corn, than would have been necessary to be laid and incurred on the old inclosed lands in the parish, in the usual course of husbandry; —and that some of the crops of oats and grass on the newly inclosed lands had, since such cultivation, been nearly as good as on the old inclosed lands; but that the crops of wheat had not in general been so good;—that, previous to the inclosure, the said lands had been open commonable lands, fed with sheep, mules and other poor stock; and that some parts of the said newly inclosed lands, which had not been so cleared, levelled, &c. had been let for 5*s.* an acre.

They further stated,—that before the inclosure, the said lands had been subject only to the payment of small or vicarial tithes;—that the plaintiff was seised of the advowson, and had presented the then incumbent, to whom (by virtue of a clause in the said act, introduced at the request of the plaintiff) a composition, in consideration of the necessary decrease in the value of the agistment tithe, and tithe of wool and lamb, which would be the consequence of the inclosure, was awarded by the commissioners, of an yearly sum of money, to be paid to him for the term of ten years, to be paid and contributed by the owners of the said newly inclosed lands, in discharge of and as a full compensation for all such tithe: and they submitted, that if the tithe now sought were payable by them, the same lands would be charged with great and small tithe at the same time.

1817.

KINGSMILL v. BILLINGSLEY and others.

time. And the answer also stated,—that although the lands had produced grass before the inclosure, it was not in great abundance, for that it was overrun with fern and furze, and could not agist and depasture a great number of sheep and other cattle; and that the tithe formerly yielded to the vicar was inconsiderable;—and that the lands so inclosed would not produce corn without extraordinary expense and labour in tilling and manuring, and were then worth about 15*s.* or 20*s.* an acre; whereas, otherwise, they would not have been worth more than 7*s.* or 8*s.*

A great number of witnesses were examined on the part of the defendant, who spoke as to the great expense attending the preparation for tillage of different parts of the land, by levelling, clearing from rock and stones for ploughing, harrowing, cross-ploughing and manuring it with lime, (which was expensive in that part of the country, from the high price of coals,) whilst other lands in the neighbourhood, for some distance, would produce two or three crops of oats without lime or manure, when converted from meadow into arable; and their evidence in general went to support the allegations of the bill. Some of them stated that the expense of preparing the old inclosed lands for corn was about 12*s.* an acre, and that of the new 6*l.* or 7*l.*

1814.

Thursday, 27th January, Thursday, 28th April, Monday, 2d May,

Fonblanque, and *Winthrop*, for the plaintiffs, contended, that the lands were not barren within the protection of the statute. All that was put in issue was, not whether the lands were capable of producing

producing a crop, but a good crop; and, no doubt, land which was manured, and more liberally cultivated, would produce a better crop than that which was not so well tilled and managed. The term barren, in the statute, relates to the soil itself, and not to the culture or neglect of it; and never was intended to be extended to lands which required to have cost and pains bestowed on them, on account of an irregular and uneven surface. And they cited *Bull. N.P.* 191;—*Witt* v. *Buck (a)*;—2 *Inst.* 656;—*Doyley* v. *Hornby (b)*, and the then recently decided case of *Warwick* v. *Collins (c)*, wherein the question of barrenness underwent much discussion in the Court of King's Bench, and Lord *Ellenborough* gave it as the opinion of the Court, that the criterion of—whether such land, after mere ploughing and sowing, would of itself produce a crop worth more than the expense of ploughing, sowing and reaping, without liming, manuring or tillage,—was not the true test of exemption under the statute, nor the rule of law in such cases, by which that defence was to be judged: in the course of which judgment, much of what had appeared in *Stockwell* v. *Terry* to favour this defence, had been obviated by the observations of the Court on the decision of Lord *Hardwicke*. And they submitted, that in the present case, the Court ought at least to grant an issue, to try the question of fact of—whether these lands were of such a nature as to require extraordinary expense or labour to bring them into tillage.

1817.

KINGSMILL v. BILLINGSLEY and others.

(a) 3 Bulstr. 166. & 4 Gw. 1574.
(b) 3 Gw. 714. (c) M. & S. 349.

1817.

KINGSMILL v. BILLINGSLEY and others.

Dauncey, and *Hall*, for the defendants, submitted, that the evidence having borne out the defence, that these newly inclosed lands required extraordinary labour, manuring, and expense, to render them fit for tillage, they were at once brought within the protection of this beneficial statute of *Edw.* VI.; which, in consideration of its object, ought to have a large and liberal construction. The expense and labour which had attended the improvement of these lands, they insisted, amounted to as much as had ever been considered to give the owner a title to the benefit of the statute. In all the decided cases, the Court had decreed without an issue; and, in the present instance, the evidence was sufficient to enable the Court to do so in favour of these defendants, there being nothing offered to contradict it on the part of the plaintiff.

In support of these arguments, on the defendants behalf, they cited *Stockwell* v. *Terry (d)*, *Hutchins* v. *Maughan (e)*, *Byron* v. *Lamb (f)*, and *Jones* v. *Le David (g)*.

With respect to the case of *Warwick* v. *Collins*, they submitted, that that decision did not on the whole militate against the present defence; and that there was nothing there which could be construed to the disadvantage of those who now claimed the exemption. The result of that case is, that extraordinary expense, either in manure or labour, must have been incurred in the cultivation. But they observed, that as far as the judgment given in that

(d) 1 Vez. 117.
(e) 3 Gw. 1197.
(f) 3 Gw. 1594.
(g) Ib. 1336.

report

report detracts from the authority of Lord *Hardwicke*'s decision in *Stockwell* v. *Terry*, there were no words in the report in *Vezey* to warrant the construction put on his Lordship's opinion; and the Court of King's Bench, in pronouncing judgment, never once adverted to the case of *Jones* v. *Le David*, wherein *Eyre, Chief Baron*, much considered the decision of Lord *Hardwicke* in *Stockwell* v. *Terry*, and recognized the criterion adopted by his Lordship. And they submitted, that it was clear, both from the words of the statute and the language of the cases, that it had never been considered necessary for persons claiming the exemption, to show that the lands were naturally totally unproductive or barren, in the common sense of that term.

Fonblanque, in reply, contended,—that enough appeared even from the answer of the defendants to render evidence unnecessary on the part of the plaintiff: for from passages read by the plaintiff, it appeared that the occupiers had had crops from parts of the newly inclosed lands, without going to any additional expense, either in employing manure or using extraordinary labour; and that alone would be sufficient, according to the doctrine of the Court of King's Bench in *Warwick* v. *Collins*, which had removed the pressure of the case of *Stockwell* v. *Terry*;—that the term *barren*, in the statute, was not applicable to land merely poor, and requiring manure; nor would the local circumstance of a particular species of manure being expensive in the neighbourhood of the lands claiming the exemption, supply the inference deducible in many other cases from evidence

1817.

KINGSMILL v. BILLINGSLEY and others.

evidence of such land's requiring extraordinary expense to subdue it to the purposes of tillage. And they submitted, that the land must be shown to be of such a nature as to resist all ordinary means of cultivation, and to be neither capable of receiving or yielding benefit without resorting to unusual modes of agriculture, and such as would be necessary to give it a fertility which it does not naturally possess; and not merely such treatment, however expensive and laborious it might be, as would increase its productiveness.

Cur. adv. vult.

The COURT, after taking time to consider their judgment, now shortly delivered their opinion through the *Lord Chief Baron**; and the result was, that an issue was ordered, to try whether the lands of which the tithes were demanded, "were "of such a nature as (exclusive of the labour and "expense of clearing the same from furze or whins, "and preparing the same for ploughing) necessarily "required extraordinary expense of liming and "manuring, or labour, to bring them into a proper "state of cultivation."

* The Reporter was not present when the judgment was delivered, but he is informed that the Court did not give the reasons on which it proceeded at any length.

END OF SITTINGS AFTER MICHAELMAS TERM.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

AND

EXCHEQUER CHAMBER.

HILARY TERM,—57 GEO. III.

AND SITTINGS AFTER.

MEMORANDA:

THE LORD CHIEF BARON was unable, from ill health, to attend the Court during the whole of this Term.

William Firth, of *Lincoln's Inn*, Esq. was called to the degree of Serjeant at Law. Motto—*Ung Roy, ung Loy, ung Foy.*

1817.

Friday, 24th January.

PEDLEY *v.* FRAMPTON.

If in an action on 2d and 3d *Edw.* VI., where the first count is for treble value of the tithes, and the rest for the single value, a verdict be entered for the plaintiff on the whole declaration, by consent, subject to the award of an arbitrator, who directs the postea to be endorsed, "30*s.* treble "value of the "tithes; da- "mages 1*s.*; "costs 40*s.*;" held to be within the 8th & 9th *Wm.* III., and that the plaintiff is entitled to his costs of suit.

A rule obtained on a motion, founded on an opinion that a plaintiff was not so entitled under such circumstances, discharged *with costs.*

MEREWEATHER had obtained a rule last Term, calling on the plaintiff to show cause why the *postea* should not be amended agreeably to the note of the associate endorsed thereon, and why the Master should not, after such amendment, review his taxation of the plaintiff's costs, the defendant undertaking to bring the amount of the costs allowed into Court.

The rule was obtained on an affidavit stating that the declaration contained a count for the treble value of tithes under the statute, and several counts for the single value; that when the cause came on for trial, all matters in difference were referred to the arbitration of a barrister, who, to save the expense of an award, with the consent of the parties, handed over his decision to the associate to be endorsed on the *postea*, which was done in the following terms: "thirty shillings treble value of the tithes taken "away by the defendant; damages 1*s.*; costs "40*s.*;"—that the *postea* itself contained a general verdict for the the plaintiff on all the counts,—and that on the taxation of costs, the Master, considering himself bound by the wording of the *postea*, allowed the general costs in the cause.

It was submitted that the plaintiff was not entitled to recover his costs of suit under the statute of the 8th

1817.

PEDLEY v. FRAMPTON.

8th and 9th of *Wm.* III. ch. 11. s. 3.* inasmuch as the value of the tithes found by the arbitrator was the treble value, and the damage awarded had not been *found by a jury*: and he cited the case of *Barnard* v. *Moss (a)*, where it was decided that the statute was confined to the case of the single value being recovered, or the damages being found by a jury.

Carbord now showed cause on an affidavit, stating that the jury, having been sworn in the cause, had found a general verdict for the plaintiff, damages £. 200, debt £. 700, subject to the award: it then stated the reference and arbitration, and that there was, besides, a special agreement to abide by the result, without taking advantage of any objection on either side. He submitted that in this case the arbitrator stood in place of the jury, and that therefore this case was within the Statute as to the damages found by him; that the verdict having

* "And be it further enacted by the authority aforesaid, That from and after the said five-and-twentieth day of *March*, in all actions of waste, and actions of debt upon the statute for not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all suits upon any writ or writs of *scire facias*, and suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same in like manner as aforesaid."

(a) 1 H. Bl. 107.

1817.

PEDLEY v. FRAMPTON.

been entered on the whole declaration, the plaintiff was still entitled to recover his costs under the statute on the single value found by the jury—or that in all events the defendant was precluded by the special agreement on the reference.

Merewether, in support of the rule, contended, that as the arbitrator had expressly proceeded on on the 1st count in the declaration to avoid the treble value, the single value was put out of the question; and if his award were to be considered as the finding of the jury, this case was not within the statute.

GRAHAM, *Baron*.—The plain object of the act is, that if the amount recovered by a plaintiff in such an action should not be sufficient to carry costs, that still the plaintiff should have them.

WOOD, *Baron*. The *postea* is itself a verdict of the jury; but the arbitrator having awarded damages, would entitle the plaintiff to his costs.

Per Curiam,

This is clearly a case within the statute. The Rule must be

Discharged with Costs.

MANT

MANT *v.* SCOTT and others.

(Exceptions.)

1817.

Friday, 31st January.

A defendant in a bill filed for a discovery in aid of an action at law, charging that he has debited the plaintiff with larger sums, as paid on his account by the defendant, than were actually paid by him, is compellable to answer whether that were so or not—and that although the accounts have been settled for several years, for there is no period of limitation in point of time within which such a bill must be filed—and though the defendants (men of good reputation) state

THIS bill, which was filed T. 56 G. III. for a discovery in aid of an action commenced at law, stated that the plaintiffs, who were merchants, had employed the defendants as their agents to sell goods at the usual commission, they (the defendants) paying all duties and other charges thereon; and to deduct the amount from the proceeds in the account sales, which account sales they were to hand over to the plaintiffs, and give them credit for the net proceeds after such deductions. It then charged, in substance, that the accounts of the sales afterwards given in by the defendants in the course of their mutual dealings, were false; as the plaintiffs subsequently discovered—that they had there stated the sums for which the goods delivered to them were sold for at considerably less than they had been purchased at: and that they had charged larger sums of money for the duty and entries of the goods, and also for lighterage, metage, landing, wharfage, &c. &c. than they had in fact paid. It charged to the same effect with respect to the sums accounted for, as having been paid for insurance of goods, which they had insured; and that they

a very strong case by their answer; for the facts stated in an answer are not conclusive.

Whether an answer may be used, or may be useful if used in a Court of Law, is for the consideration of the Court.

The true tests as to whether questions are to be answered or not are, 1st, Whether the answers might lead to the crimination of the defendant; and 2dly, Whether they are relevant, and may be material to the case of the plaintiff.

1817.

MANT v. SCOTT and others.

had also charged for insurances which they had not effected—that certain quantities of the goods so delivered to the defendants for sale (they being also dealers in the same goods,) had been retained by them at prices considerably below their real value, and had not been, in fact, sold at all, or were sold on their own account at an advanced price. And they charged, that if the accounts should be fairly taken between all parties, and certain documents in the defendants possession produced, a large balance would be found to be due from the defendants to the plaintiffs.

On this alleged state of facts the plaintiff put the following interrogatories:

Whether the defendants had not charged the plaintiffs with some, and what sums or sum of money for the duty and entries of the said corn, grain, and other articles; and also for the several particulars thereinbefore mentioned, or some, or which of them, much larger than was in fact paid by the said defendants for the same, or how otherwise?

And whether they had not in their said account, charged plaintiffs with divers, or some, and what sums of money, for insurance, alleged to be paid by them on the goods sold by them for the plaintiffs, or some, and which of them, or how otherwise?

And whether they, or any, and which of them, did in fact insure the said, or any, and which of them?

And whether the said sums paid for such insurance, were not less, and how much less, than the

sums

sums charged for insurance to the plaintiffs, or how otherwise?—and requiring that the defendants might set forth the names or name of the offices in which they insured; and which of the cargoes of goods entrusted to them by the plaintiffs for sale, as aforesaid; and the sum and sums of money in which each and every of such cargoes was actually and *bonâ fide* insured by them, and the said sum and sums of money paid by them for the premiums of such insurance, and for the stamp duty thereon; distinguishing the sums paid for premium from the stamp duty.

And whether they did not afterwards sell the said parcels for a very advanced, or some, and what price; and whether they did not retain the difference between such price and what they had allowed the plaintiffs to their own use, or how otherwise?

And whether they did not make very large, or some, and what profits thereby; and that they might set forth a full and fair account of all sum and sums of money paid for duty, fees of entry; and also the several sum and sums of money paid for metage, lighterage, landing, wharfage, porterage in and out of granary or warehouse, re-metage, weighing, rent, insurance against fire, turning and screening in granary, and other expenses paid thereon; together with the quantities, rates, and times, in and for which such expenses were paid, and where and to what person or persons by name, such expenses were paid, and where such persons now reside, and the method of calculating such expenses, deducting from each particular item of expense the discount

1817.

MANT v. SCOTT and others.

or abatement declared thereon by the person or persons with whom such expenses were incurred?

To these interrogatories the defendants answered generally as follows (denying the facts alleged by the bill:)

That during their employment by the plaintiffs, (which they admitted,) and up to the 5th day of *July* in the year 1809 they charged to the said complainants, under the head of duty and entries, a sum at and after the rate of 10 *d.* per quarter on wheat, and 8 *d.* per hundred weight on clover seed; that after the 5th day of *July* 1809, when the duty was increased 2 *d.* per quartern, they then added that amount to their former rate of charges, and from thenceforth charged to the complainants, and also to their correspondents generally, at the rate of 1 *s.* per quartern for duty, entry, &c. on wheat. That after they had rendered and delivered to the complainants the five first accounts, they received a letter from the complainants, dated the 15th of *August*, noticing the charges therein for entry, duty, &c. to be 388 *l.* 4 *s.* instead of which they stated that they had calculated the same to be 339 *l.* 16 *s.* 7 *d.* making a difference of 48 *l.* 7 *s.* 5 *d.* —that on the 18th they answered that letter, referring their charges to a rate which, besides the charge of duty and fees actually incurred, would cover other incidental expenses attending the business, and a reasonable compensation for the additional trouble, which they stated they believed to be perfectly mercantile and regular; that from thence-

thenceforth they continued to make such and the like charges in all their subsequent accounts during the continuation of their employment by the complainants, and their respective copartners, with such addition only as hereinbefore mentioned, and lighterage, and that such charges were afterwards acquiesced in by the complainants. That it was the known custom of the defendants in their business, and the custom of all houses on the Corn Exchange, well known and understood by the complainants at the time of their employment of the defendants, not to charge on the exact or specific amount paid for metage, landing, wharfage, porterage into and out of granary, re-metage, weighing and other expenses upon corn, grain, and other seed put into their hands for sale, but instead thereof to charge a general and specific rate, which includes a profit upon the charges so made.

That it was a general and admitted principle, acted upon by the complainants themselves, and by all merchants, to make a profit upon the charges expended by them in the course of their business, by way of compensation for their advance, expenditure and trouble; and that in the case of corn-factors, the profit on their charges is the only compensation which they have for their additional trouble in the care, charge, management, and superintendance, frequently for a great length of time, of grain when landed into and kept in warehouse, the commission charged by corn-factors being a recompence only for the sale and the risk of the solvency of the buyers.

That

1817.

MANT v. SCOTT and others.

That it is impossible to introduce or apply any specific sum, part of such expenses, as applicable to any particular parcel or quantity of grain or seed, but that the profit or charges made by the defendants are only a reasonable compensation to them for their expenditure and trouble.

That if the complainants had thought such charges unreasonable, and which were at the time well known to them, and particularly to the complainants, who were residing in *London*, and well versed in the corn-trade, and in every charge and expenditure appertaining thereto, they might have avoided such charges, by taking the custody and management of the grain into their own hands, as is practised by some merchants, and by employing the defendants in such cases solely in their character of factors, with a commission for sale and guarantee.

The answer also stated, having set forth the rates of charges, that those charges, together with the charge of entry, duty, &c. as therein before explained, were the several charges upon which the defendants, and, as they believed, all other corn-factors, derive a profit, and therefore the defendants admitted that in the instances and under the circumstances therein before and after mentioned, they had, by means of charging the fixed and usual rates thereinbefore specified, charged the plaintiffs in their respective copartnerships with sums of money larger than what was actually paid by them specifically for the same, as they humbly submitted they had a right to do.—That the nature and amount

of

1817.

MANT v. SCOTT and others.

of their charges were known to and understood by the plaintiffs before the employment of the defendants, and before the transactions in the bill mentioned, and were also known to, and fully understood and assented to and acquiesced in by the plaintiffs at the time.

That the plaintiffs paid to other corn-factors employed by them in similar business, as the defendants believe, as high or higher charges on the whole, although varying, in some instances, in mode and form, than the charges made by the defendants; —that the employment of the defendants was on the express understanding and condition that the defendants were to charge to the plaintiffs, with respect to the matters in the bill mentioned, at such rates as they the defendants had usually been accustomed to do, and as the defendants did do to all other persons; and that during the employment of the defendants the object of the charges was frequently discussed and assented to by the plaintiffs and their respective copartners, or some of them, at various meetings that took place at a period subsequent to the plaintiff's letter of the 15th of *August* 1809, and the answer thereto, at which meeting, (among other matters) the subject of the defendants' charges, and the defendants' mode of transacting their business, was fully entered into, discussed and explained. And the defendants then stated, that unless the plaintiffs assented and agreed to the charges of the defendants and their mode and manner of doing their business, they would not have accepted the employment on any other terms.

And

1817.

MANT v. SCOTT and others.

And they added, that after such meeting the plaintiffs continued their employment of the defendants.

The answer then stated, that all the several charges contained in the accounts rendered by the defendants to the plaintiffs, in their respective copartnerships as aforesaid, were by them, as the defendants believe, again charged to and allowed to them by the owners and proprietors of the said corn, grain, and seed, in the bill mentioned, and have been received back again by the plaintiffs from such several proprietors, with the addition of their usual merchant's commission.

The defendants also stated, that they had not, in their accounts, to their knowledge or belief, charged the plaintiffs with divers or any sums of money for insurance against fire, alleged to be paid by the defendants; because the defendants say that their rate of charge for granary rent, included therein the risk of fire; and the defendants, in consequence of such charge, were answerable and responsible to the plaintiffs for the amount of all such articles belonging to them, and warehoused by the defendants, in case any such had been destroyed by fire while in their care and custody.

And that they had considerable general insurances for their own personal security, running and in force at the time of the transactions with the plaintiffs in the bill mentioned, but not any specific or particular insurance on the property of the plaintiffs.

They

1817.

MANT v. SCOTT and others.

They admitted that they had purchased and taken on their own account the few parcels of the corn, &c. which were set forth in their schedule, but that they were afterwards resold by them on their own account; and where there was any difference they retained such difference, or bore the loss, as the case happened. But they stated, that for the reasons and under the circumstances aforesaid, they had not set forth the sums at which such parcels of corn, &c. were sold by them; and they insisted that they were not bound so to do. They denied that any balance would be found to be due to the plaintiffs; and as to that part of the bill, they relied and insisted that on an account having been settled and allowed, there had been found a balance due to plaintiffs, which was afterwards paid to them by defendants; and that there had been no farther dealings between them.

The defendants in their answer finally stated, that they had not set forth any account of the sum or sums of money paid for duty, or fees of entry, metage, landing, wharfage, porterage in and out of granary or warehouse, re-metage, weighing, turning, and screening in granary, and other expenses paid thereon; nor to what person or persons by name any such expenses were paid, nor where any such persons now reside, nor the method of calculating such expenses; because these defendants say that all such payments and expenses, except turning and screening, are included in and compensated by the specific charges made by the defendants at the rates and in the manner hereinbefore mentioned;

1817.

MANT v. SCOTT and others.

tioned; and which specific charges were so made with the express knowledge and approbation of, and assented to by the said complainants, in the manner, and for the reasons, and under the circumstances hereinbefore mentioned: and they submitted that they were not bound to set forth any such account, for the reasons aforesaid.

To that answer the plaintiffs took the following exceptions:

1st. That the defendants had not answered and set forth, according to the best and utmost of their knowledge, remembrance, information and belief, whether they the defendants had not charged the complainants with some, and what sums or sum of money, for the duties and entries of the corn, grain, and other articles, mentioned in the bill; and also for the several particulars therein, also in that behalf mentioned, or some, or which of them, much larger than was in fact paid by the defendants for the same, or how otherwise.

2d. That the defendants in and by their answer, had not in manner aforesaid, answered and set forth whether they had not, in their account mentioned in the said bill, charged the plaintiffs with divers or some, or what sums of money for insurance, alleged to be paid by them on the goods sold by them of the plaintiffs, or some, or which of them, or how otherwise.

3d. For that the defendants had not, in and by their answer in manner aforesaid, answered and set

set forth whether they, or any and which of them, did in fact insure the said goods, or any and which of them; or whether the sums paid for such insurance were not less, and how much less, than the sums charged for insurance to the plaintiffs; or how otherwise.

4th. That the defendants had not, in and by their answer in manner aforesaid, answered and set forth the name or names of the offices or office in which they insured all and each of the cargoes of goods intrusted to them by the plaintiffs for sale, as mentioned in the bill, and the sum and sums of money in which each and every such cargoes were actually and *bonâ fide* insured by them, and the sum and sums of money paid by them for the premium of such insurance and for the stamp duty thereon; or distinguished the sums paid for premiums from the stamp duty.

5th. That the defendants had not, in and by their answer, in manner aforesaid, answered and set forth whether they the defendants, or some or which of them, or some or what person or persons on their, or some and which of their behalf, did not afterwards sell the parcels of corn and grain and other articles retained by them, as mentioned in the bill; or some or which of them on their, or some and which of their account, for a very advanced or some or what price, and retained the differences between such prices, and what they had allowed the plaintiffs to their own use; or how otherwise.

6th. For

1817.

MANT v. SCOTT and others.

6th. For the defendants had not, in and by their answer in manner aforesaid, answered and set forth whether they the defendants, or some and which of them, or some and what person or persons on their, or some and which of their behalf, did not make very large, or some or what profits thereby.

7th. For that the defendants had not, in and by their answer in manner aforesaid, answered and set forth a full and fair account of all sum and sums of money paid for duty, and upon what quantity of weight, and at what rate such duty was paid, together with the fees of entry; and also the several sum or sums of money paid for metage, landing, wharfage, porterage in and out of granary or warehouse, re-metage, weighing and rent, insurance against fire, turning and screening in granary, and other expences paid thereon, together with the quantities, rates and times in and for which such expences were paid, and to what person or persons (by name) such expences were paid, and where such persons now resided; and the method of calculating such expences, deducting from each particular item of expence the discount or abatement allowed thereon by the person or persons with whom such expences were incurred.

Martin and *Wingfield*, in support of the exceptions, submitted, that as the interrogatories were such as were calculated to obtain answers which might assist the plaintiffs in their action at law, without

1817.

MANT v. SCOTT and others.

without criminating the defendants, they were bound to answer them fully.

Wetherell and *Barber*, for the defendants, insisted, that if the interrogatories put should not be considered altogether irrelevant, they were of such a nature, that the defendants, who were persons of the highest respectability, ought not to have been called upon, and could not be compelled to answer; that they were interrogatories of a criminatory nature, and were so framed: and they contended that, in fact, they were answered as far as was practicable, and could be beneficial to the plaintiffs, if they could use the answer in a court of law; and that, according to the case made by the defendants' answer, the plaintiffs ought not to be permitted to put such questions. And they adverted, as a farther argument, to the distance of time at which the accounts were now sought to be unravelled, the long accounts of the mutual dealings between the parties having been finally closed in the year 1810.

GRAHAM, *Baron*.—I cannot help thinking that the defendants are in difficulty here. We are to look to the position of the cause before us. Here is a bill filed which would go to overreach the charges of an account closed indeed so long ago as 1810, but it states, as one distinct fact, that the defendants had given in from time to time an account as being fair, and which the plaintiffs considered as fair, and upon which they continued to deal for several years; but which they have since discovered to contain a number of improper charges; and that among

 others

1817.

MANT v. SCOTT and others.

others there is a charge for duties considerably beyond what was paid by the parties themselves, in repeated instances; and also, that the charges of commission had been overrated, and that they had retained part of the goods acquired and sold by them as factors, and accounted for prices considerably below what they had in fact received. The plaintiffs pray a discovery of this. Then how is it met? By an answer that may indeed be true—that these defendants, (who are said to be persons of great credit, and ought not to be called on to go into a detail of these transactions at this distance of time) had by letter come to an agreement with the plaintiffs that they were to make their charges, not according to their disbursements from time to time, but according to the rate of so much per ton or hundred weight, and that this was perfectly understood by the parties; and then it is argued, that because this is stated in the answer we are to consider any farther inquiry irrelevant, and that it would serve no purpose, because, it is said they must, in a court of law, state a case upon which they are sure to be nonsuited. But in arguing the exceptions, in order to shew that the defendant is not to answer upon the present occasion, it is not to be said that we are to pronounce now that the plaintiff is to be nonsuited at law, and that these inquiries ought not to be made. There is a fallacy in this; for the defendant assumes that that part of his case is proved which he states in his answer. It is true they state that correspondence and discussions took place; but the plaintiff has a right to say, I never did agree to any thing so injurious to my own interest as the

the paying of such large sums as these. We cannot, therefore, hold, that the plaintiff is concluded by what the defendant says in his answer, for he must support it by proof when it comes forward for decision. The matter then stands thus: the defendants have thought that this is not a case to be enquired into, and that their character and conduct may be involved in the enquiry; but if when called upon they answer it, it must be a full answer, and we are not prepared to say that it is not a requisite part of the plaintiffs' case to shew, that having placed too great a confidence in the defendants, he was imposed upon. He says, I will show that they have charged, as a *ratio* for these duties, infinitely beyond not only what they actually paid for the duties, but even beyond the bounds of their own *ratio* upon the business which they have done for us. Now I think, that both *ex necessitate rei & ex debito justitiæ*, the plaintiff has a right to have the discovery, in order to show that the defendant did not pay the sums he says he has disbursed, according to the allegations of the bill.

WOOD, *Baron*.—I am of the same opinion. It appears that the plaintiff has brought an action at law against the defendants for the purpose of recovering money overpaid to them, and he files the present bill to enquire into the circumstances and measure of those payments; it is said that the defendants are not bound to give any answer to those enquiries, as the answers would be of no use to the plaintiff at law. That may be so; but how is it possible for us as yet to know that? we

1817.

MANT v. SCOTT and others.

cannot say that the answers will be of no use at law till the discovery be made. It is competent for the plaintiff to invalidate the accounts in a court of law; and if he can shew that these accounts have been settled in ignorance of the facts, it would impeach them at law, and entitle the plaintiff to recover. Now it is material in a court of law to show, that instead of charging for a sum he actually paid, he charged a great deal more; that is therefore a proper discovery to obtain, in order to enable him to maintain his action at law. Then the discovery will not subject the defendant to any imputation of crime, nor is the discovery sought for the purpose of idle curiosity; but it is extremely important and necessary to the plaintiff's case, and therefore he ought to be called upon to answer.

RICHARDS, *Baron*.—I am also of the same opinion. I have looked through the pleadings in the suit, and I think it is quite clear. This is a bill to procure a discovery from the defendants, which is to be used in an action at law, as may be thought necessary. The question is taken from this Court the moment the discovery is made, so that we are not called upon to act upon the discovery in any manner whatever, or to give any opinion on its probable effect. When it is said that the discovery cannot be made useful at law, we ought to be extremely clear that that is true; but if so, it does not prejudice you. Besides, if you say any thing that the plaintiff at law can read against you, in answer you may read your own case; so that in truth the plaintiff gives you the advantage of being a witness

a witness for yourself. It is no objection to an interrogatory for discovery, that you state in your answer that it relates to matters which would be of no use at law: If the court of equity, which is called upon to compel discovery, can be satisfied that that is so, it will not give the discovery; but if a defendant be entitled to protect himself, by stating as facts things which are not facts, there could be no discovery obtained in any case; but we are not called upon to believe or disbelieve one word of what he says in his answer, or to exercise any judgment at all. I believe these defendants would not state any thing untrue; but we are to look upon their answer with the same eye as we would regard that of any other suitors of the Court. They must answer the bill for discovery, unless the rules of the court protect them, for they cannot defend themselves by any little obstruction that stands in the way of the plaintiff, and they must answer fully, unless any of the answers called for would be disclosing a crime, or would be clearly irrelevant or useless, or nonsensical. But when it is alleged that the entries and duties are charged for at more than they in reality amounted to, can any body say that the answer to that would be either nonsensical or inapplicable to the case? However just the representation of the character of the defendants may be, still their answer is no more to be believed here than that of any other person putting in an answer in any common case of discovery. It is possible for the plaintiffs to disprove it, by shewing that it is not true in point of fact. The answer is, as it were, an

1817.

MANT v. SCOTT and others.

address to a jury on the facts, by the defendant himself; if those facts be true, a jury might give a verdict accordingly; but we sitting here are not a jury, nor are the facts all before us till the discovery is made, and then it is to be carried before a jury.

It is true that nearly six years ago these accounts were settled; but there is no bar in point of time, nor statute of limitations, which prevents their going into the account again. The lapse of time is nothing to us, we are to consider the nature of the case as it appears upon the record. Then the sole question with us is, does the law allow a discovery to be made? Does the practice of the court compel it? Beyond all doubt it does. And it may be granted, without charging any criminality on the defendants, the allegation being that they, taking advantage of the great confidence reposed in them by the plaintiffs, and acting in a fraudulent manner, have prevailed upon the plaintiffs to settle accounts which have been untruly stated. The defendant says, "they are true;" the plaintiff, on the contrary, says, "they are not truly stated." Can we prevent them answering all questions that may be asked, if they be applicable to such a case? Certainly not; and unless we lay it down as a rule, that a defendant in any case may, by stating that the facts enquired of are not applicable to the case depending at law, protect himself from a discovery, we must grant it in this instance. But that is not so. Nor is it because a defendant makes a strong case by his answer that we

are

1817.

MANT v. SCOTT and others.

are to refuse a discovery. The plaintiff may reply, and he may disprove the defendant's case as stated. Upon the whole, we are clearly of opinion that the discovery sought for should be granted.

1st, 5th, 6th, and 7th exceptions allowed.

1817.

Saturday, 1st February.

The KING, in aid of REED and Others, v. HOPPER and Others, Assignees of MOWBRAY & Co.

THE defendants having put in a claim to the property seized under this extent in aid, as assignees of the bankrupts, had pleaded, that *Mowbray & Co.* being traders, had become bankrupt, and that afterwards, and before the issuing of the writ of extent, and before the 24th of *July* (the teste thereof), to wit, on the 22d *July*, the commissioners did bargain and sell, &c. the effects, &c. of the said bankrupts, to *Henry Page*, the provisional assignee; which said indenture of bargain and sale was before, &c. (on said 22d *July*,) in due manner enrolled in His Majesty's High Court of Chancery. Without this, that certain of the bankrupt partners were on the 24th *July* seized and possessed of the several freehold and leasehold estates mentioned in the schedule annexed to the inquisition as therein supposed; wherefore they prayed judgment and restoration.—Replication taking issue.

A deed of bargain and sale, enrolled under the statute, held to have been rightly enrolled as of the day when it was brought into the Inrolment Office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk, or in fact received by him, till two days afterwards.

The endorsement by the clerk of the enrolments of the day of the enrolment, by way of date, is a part of the record, and cannot be averred against; nor is evidence admissible to show that it was in fact enrolled on some other day; and that although the date be written on an erasure.

1817.

The KING, in aid of REED and others, v. HOPPER and others.

There were, therefore, three issues to be tried: 1st, Whether the bankrupts were seized and possessed of the freehold and leasehold premises mentioned in the schedule: 2dly, Whether the firm had become bankrupt: 3dly, Whether the commissioners had, by bargain and sale, duly enrolled on the 22d *July*, before the teste of extent, bargained and sold to *Page* the provisional assignee.

On the trial before Mr. Baron *Richards*, at the sittings after Easter 1816, a verdict was given for the defendants, absolutely, on the second issue, subject to the opinion of the Court on the first and third; and that depended on whether a certain deed of assignment had been, in point of law, enrolled, or not, on the day on which it had been brought to the office.

A rule was consequently granted in the following Trinity Term, calling on the prosecutors of the extent, to shew cause why a verdict should not be entered accordingly for the defendants on those issues.

Tuesday, 28th January.

Mr. Baron *Richards* now read his report of the evidence given on the trial, from which it appeared in substance, to have been proved, — that the deed of bargain and sale was taken to the Enrolment Office for the purpose of being enrolled, on *Saturday* the 22d of *July*, after the appointed office-hours (from ten till three) and delivered to the porter; — that it was the custom of the office, for the porter (who was entrusted with the key for that purpose) so to receive

1817.

The KING, in aid of REED and others, v. HOPPER and others.

receive such deeds after the clerks had left the office, who was paid a fee of one shilling with every such deed delivered to him;—that whenever a deed was so left, it was the course to make a minute of the day, which was afterwards made the date of the enrolment, but such minute is not made by the porter at the time it comes in, but afterwards by the clerk;—that if search had been made at the office for the deed, on *Saturday* evening or *Monday* morning, before the arrival of the clerk, it would have been forthcoming for inspection;—that the deeds are not usually in fact enrolled, nor the certificate of inrolment made out, till several days after the deeds come into the office.

It had happened, in the present case, that the clerk, on coming to the office on *Monday* morning (the 24th), finding the deed on his desk, had entered it in his minute book as having been brought in on the 24th, and it was afterwards enrolled as of the 24th; but discovering the mistake on being informed by the porter that it had been brought in on *Saturday* the 22d, he altered it to the 22d, accordingly, by erasing the "4th" and writing the "2d." The certificate was not written till some days after the 24th, and the clerk had altered the certificate which he had made originally, purporting that the deed had been enrolled on the 24th, to the 22d, in the same manner. It was also proved, that on the deed being delivered to the porter by the clerk of the solicitors to the commission, the porter, in his presence, opened the door of the office, and took it in and laid it on the desk

1817.

The KING, in aid of REED and others, v. HOPPER and others.

desk of the clerk of the enrolments according to his usual practice.

Dauncey, *Walton*, and *Littledale* now shewed cause. They contended that what had been done on the 22d could not be considered as an enrolment of the deed in question under the act, nor as being tantamount to it;—that some authentic minute, at least, should have been made of the deed having been brought in by some responsible person having authority to do so:—that the act of enrolment was a solemnity requiring every due formality to be observed in order to render it complete and availing:—that the mere carrying a deed to the office and delivering it to a Porter there, could not be regarded as an enrolment under the statute, or the object of it would be often defeated. Every enrolment was required to be on parchment. Com. Dig. Bargain and Sale, B. 6.—2 Inst. 673.—*Lill. Pr. Reg.* p. 89, (b) C.—They submitted also that as it was in evidence, that there were well-known hours appointed for attendance at the office, for the purpose of business, it was the duty of persons interested in the inrolment of deeds to bring them, during those hours, and if necessary to see that they were actually enrolled, or at least minuted, or that something were done which might be considered a beginning to enrol, and that if they did not they must be content to lose the benefit of it.

They further contended that if what had been done on the 22d was not a due enrolment, the Crown was not concluded by the certificate of the date of the present

1817.

The KING, in aid of REED and others, v. HOPPER and others.

present enrolment, but were entitled to go into evidence of the circumstances, to shew notwithstanding the indorsement by the officer, that the deed had been enrolled on the 24th in fact, and not on the 22d, and that it had been originally certified as having been enrolled of the 24th of *July*; for that as the date, at least, was no part of the record, it might be averred against, and proof would be admissible, that the alleged day of the date was not the true one;—that this was not a judicial record, but merely ministerial, and ought not to be held to be conclusive as against those who might be interested in falsifying it;—that the object of recording the existence of the deed was not such a one as necessarily precluded all right to question the time of the enrolment, which they submitted was no part of the record itself as forming the date: and that they illustrated by the fact of its being pleaded as matter *in pais*, which they insisted was an admission by the other side, that it was not a conclusive record, for in that case it must have been pleaded with a *prout patet*; or it would be ground of motion in arrest of judgment; the only fact on record being that the deed had been enrolled. So in *Hynde*'s case *(a)*, the Court held that the time of an enrolment shall be tried *per pais*, *Lill. Pr. Reg.* p. 89, (b) H.—And to the same point they cited *Holland* v. *Downe (b)*, where the whole question at issue was the time of the enrolment. In *Buller's Nisi Prius*, 6 edit. p. 229, it is said a fine to be proved with proclamations

(a) 4 Co. Rep. 72. *(b)* Sav. Rep. 91.

must

1817.

The KING, in aid of REED and others, v. HOPPER and others.

must be examined with the roll, because the chirographer is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding. So here the clerk is not appointed or authorized by the statutes to indorse the deed with the time of the enrolment, and therefore it is not conclusive. Before the 16 *Eliz.* the date of the enrolment was never inserted, and there is no statute requiring that a date should appear. If inserted, therefore, it cannot, since that act, be considered as in fact any part of the record, and whatever weight the circumstance of the date might have with the jury, it is at least a matter entirely for them. In the *Duke of Somerset's* case, in *Dyer (c)*, a reporter of high authority, it is said to have been held that a depositing a deed for enrolment in a chest in court, which was not afterwards actually enrolled, was not effectual, and whatever doubt the marginal notes may have thrown on that case, it is still in point to shew that at least such was the opinion of *Dyer*. They submitted (on a suggestion of Mr. Baron *Graham*,) that in cases where the question was whether a deed had been enrolled within six months after date or not, if the certificate should be held to be conclusive of that, it must be as was said in *Worsley* v. *Filisker (d)*, because the date was made parcel of the record by the operation of the statute. If, however, on the other hand, the indorsement should be held to be part of the record, and that, therefore, it could not be averred against,

(c) Dy. Rep. 355, a. (d) 2 Roll. Rep. 119.

then

1817.

The KING, in aid of REED and others, v. HOPPER and others.

then they submitted that it ought not to have been altered from what it originally recorded, as the day on which the deed had been enrolled, and certainly not by the clerk without the authority of the Court, whose minister he was. It might (they suggested) have been seen on inspection in the office before the alteration had been made, when it would have appeared to have been enrolled (as it was originally minuted), of the 24th, and the most mischievous consequences might have ensued from such an accident, if it were permitted to a clerk to alter the date at any distance of time after it had been recorded. If his minute of the date of the enrolment were to be regarded as part of the record of the fact of the deed having been enrolled, the Crown, or any other creditor, might have seized before the alteration were made, when the record would have justified the seizure; yet the same record, if permitted to be altered, would support any action brought afterwards for the trespass.

Therefore they contended on the whole, that the present deed had not been duly enrolled at all; or that if it had, it was only effectually enrolled on the 24th;—that it having been once recorded as enrolled of that day it could not be altered to any other day without leave of the Court;—and that the day of the enrolment, as expressed in the certificate, being no part of the record, they might be allowed to give evidence against the truth of the endorsement, to shew the true day on which the deed had been in fact enrolled.

And

1817.

The KING, in aid of REED and others, v. HOPPER and others.

And they suggested, that if such alterations were allowable, they would admit all the mischief of practical collusion on the part of the porter and the persons interested.

Scarlett and *Hullock*, Sergeant, in support of the rule, contended, that the deed of bargain and sale must be considered as inrolled from the time when the deed was first carried to the office; for that the person bringing it in had no power to compel the clerk to inrol it immediately, and therefore was not bound to see the deed actually inrolled; he had done all in his power to that end, and was entitled to any benefit resulting to him from the act—that it was not necessary to see the deed enrolled, or even minuted; and the thing itself, besides, would most frequently be impossible—that the porter, who was entrusted by the clerk with the key of the office, for the express purpose of receiving deeds for enrolment after what were called office hours, represented the clerk himself, and therefore, a delivery to him was the same thing in effect as a delivery to the superior officer; nor was any authority cited to shew that such an act was not at least tantamount to an inrolment. As to its being necessary that it should have been begun at least to be enrolled, it is not the practice in any case to do so; and even judgments are never actually recorded till after execution has been sued out on them, unless from some special purpose.

The next question that arises is, if what was done be to be considered as a sufficient delivery at the office,

1817.

The KING, in aid of REED and others, v. HOPPER and others.

office,—whether it ought not also to be held to have been enrolled on that day, although, in point of fact, the formality of ultimate enrolment should not be completed till some subsequent day. On that point the case in *Dyer*, *(e)* would of itself, perhaps, seem to be an authority that it ought not; but the marginal notes to that case show that that decision, as reported, has never since been considered as law, and the cases referred to in those notes are *The Dean and Canons of Windsor* v. *Middlemore*, (cited in *The Dean and Canons of Rochester* v. *Sir Miles Sandes (f)*,) *Ludford* v. *Gretton (g)*, and an anonymous case of *East.* T. 3d *Eliz.* To the same point also were cited *Garrick* v. *Williams (h)*, and *Deponthieu* v. *Pennyfeather (i)*.

In all events, however, (they contended) the certificate of the officer of the time of the enrolment must be taken to be conclusive, and nothing can be averred against it; for although it is true that the statute does not require the time to be noticed in the enrolment, yet in common sense, and for obvious convenience, it must be considered a most material part of the record, for often (as in the present case) every thing may turn on that fact. The enrolment here is not denied; the dispute arises as to the time. After the 16th of *Eliz.* it became a rule in practice, that the date of enrolments should be inserted, and the reason is

(e) The Duke of Somerset's case, p. 355.
(f) Moore, 676.
(g) Plowd. 490.
(h) 3 Taunt. 544.
(i) 1 Marsh. 264.

obvious.

1817.

The King, in aid of Reed and others, v. Hopper and others.

obvious. Wherever, therefore, the officer certifies the time, the books all hold that it must be taken to be part of the record, and that therefore it cannot be averred against; and they cited *Holland* and *Franklin's* case *(k)*, Sir *Thomas Howard's* case, *(l)*, Lil. Pr. Reg. p. 89 A. (b); *Worsley* v. *Filisker*, *(m)*, *Kinnersley* v. *Orpe* *(n)*, and *Garrick* v. *Williams*.

But even if it were not conclusive on that point as a record, they contended that on the evidence, if it were to be let in, it would have appeared to have been enrolled in fact on the 22d, for the deed was, they submitted, actually enrolled on that day, because it was then left at the office.

To meet the objection of the clerk having no authority to alter the record, they insisted that a mere misprision might be amended at any time, as was constantly done; and in a late case, even after a writ of error brought:—that the present amendment had been no more than a voluntary correction of an accidental mistake: and they submitted that even if the clerk had done wrong in spontaneously making the alteration, the Court were bound by it, if it be found to be right when called for, however reprehensible it might be in the clerk who has taken on himself to do so (*Garrick* v. *Williams*, cited *ante*). If, indeed, the record had been altered

(k) 1 Leon. 183, and *Holland* and *Bein's* case, 2 Ib. 1[illegible]
(l) Owen's Rep. 138. (m) 2 Roll. Rep. 119.
(n) 1 Doug. 56.

from

1817.

The KING, in aid of REED and others, v. HORTON and others.

from right to wrong, it might perhaps have been restored, on application by them to the master of the rolls, for that purpose; but until that was done, it was binding and conclusive; and they stated that, in point of fact, a petition had been presented for that purpose, but his honour had refused to entertain the application.

As to the suggestion of possible collusion, if there were any such thing capable of being proved, they insisted that it should have been pleaded specially, and that it should have been replied, that the date had been altered *per fraudem*.

1st February.

Dauncey, in reply, urged the distinction which, he submitted, subsisted between the record of the *fact* of the enrolment, and of the *time* of that fact, against the arguments pressed on the other side to sustain the proposition that the date of the enrolment, as part of the *record*, could not be averred against. And he insisted that another distinction arose, on this being a case where the record had been altered from right to wrong, and that therefore, on those grounds, the cases which had been cited did not bear against the arguments used in support of the present rule. Those cases, too, (he submitted,) which had been opposed to the authorities cited against the rule, were cases where the parties disputing the day of the enrolment were parties to the instrument, and were on that account held to be precluded: whereas, in the present case, the prosecutors of this extent were *strangers*; and that is the distinction taken in the case of *Holland* v. *Downe*,

1817.

The KING, in aid of REED and others, v. HOPPER and others.

Downe, cited from *Saville*—a distinction which (he observed) reconciled the apparently contradictory decisions to be found in the books, and which should be the groundwork of the doctrine which the Court were about to establish by their decision on the present question.

GRAHAM, *Baron*. This is a case, not only of great importance to the parties, but involving, in point of practice, a question of considerable moment to the public; I am, however, desirous of deciding it now, on the recent impression of my mind, unless my brothers should wish to take time to consider it.

[His lordship then stated the facts and the question.] The point itself lies in a narrow compass, and in an ordinary case would not have so much occupied the attention of the Court. On the one hand it is contended, that the enrolment is not of itself a record, and that it therefore admits of an averment impugning its date. On the other hand it is insisted, that being a record, it is conclusive; and that as the certificate states the deed to have been enrolled on the 22d of *July*, it must be taken to be true, and cannot be further inquired of.

Another question is, whether,—if evidence could be let in to shew the true day on which the deed was actually enrolled,—from the statement of the testimony before the Court, the deed was not, in point of law, under those circumstances, in fact, enrolled on the 22d of *July*, the day on which it was brought into the office.

On

1817.

The KING, in aid of REED and others, v. HOPPER and others.

On the first point there exists much contradiction in the cases; but, on due consideration, I am of opinion that, as to all that relates to the fact of enrolment, it must be treated as a record; and I take it that, from its very nature, it must be so considered. The distinction is plain. The instrument itself is certainly not a record; the certificate of its having been enrolled is. The history of enrolments is well known. The preamble to the 27th H. VIII. (ch. 10.) details the inconveniences which arose from the effects of the clandestine nature of the doctrine of uses; and it was intended that those inconveniences should be obviated, by that act requiring deeds of bargain and sale to be enrolled in some court of record, thereby supplying that notoriety, from the absence of which, in such modes of conveyance, so many mischiefs were said to have arisen. The object of enrolment, then, was to give publicity to such conveyances, as in the case of letters patent, which are null unless they have been duly enrolled. All this goes to illustrate the position, that enrolment is matter of record. The case most relied on for the Crown is that of *Holland* v. *Downe*, in *Saville*, which is also reported, and with some difference in *Owen*; for it is stated in *Saville*, that the court let the parties in to aver against the record; whereas, according to *Owen*, the record was held to be a bar, and conclusive. But giving the Crown the full benefit of that case, as reported in *Saville*, yet there have been cases in more modern times which have established, that no averment or evidence shall be received to shew that the day of the date of an enrolment is incorrect. It has been said

1817.

The KING, in aid of REED and others, v. HOPPER and others.

that *Hinde*'s case is in favour of the arguments used for the Crown on this point, but I think that case makes much more strongly for the defendants on the present occasion; for in that case, which arose entirely out of the practice, then usual, of dating generally as of the term, which is always considered as relating to the first day of term, the Court would not suffer that usage to work an injustice; and the whole reasoning of the Court on that decision tends to shew that they treated the enrolment as a record, and one which concluded all men from denying any thing appearing within the record, as antedate, &c.; but they certainly held that they might take an averment which stood with the record, and did not impugn any thing apparent within it. Now here the precise day of the enrolment is apparent within the record, and therefore, according to that case, cannot be impugned by going into evidence in support of an averment against it.

Then the very modern case of *Garrick* v. *Williams* is quite decisive on this point against the Crown. It was in evidence there, that the enrolment had originally stood unquestionably wrong, and that it had afterwards been made right by the clerk, of his own authority. It was contended that the clerk had no right to do so without leave of the Court; but the Court of Common Pleas held, that the enrolment was conclusive. On that occasion the matter had been brought before the Master of the Rolls, on an application to have the alteration restored to its original state, who put this unanswerable question to the counsel who were in support of

the

1817.

The KING, In aid of REED and others, v. HOPPER and others.

the application?—"Is there any case wherein a court has been called on to alter a record from what was right to what was wrong?"—The petition was consequently dismissed. That is also an authority to shew that these enrolments are records.

It can hardly be necessary to go to the other parts of this case, or to give an opinion that where all that it is possible for the party to do, whose object is to procure the enrolment of a deed, has been done by him, although the last ceremonials of enrolling, which it is the duty of the officer to perform, yet remain to be done, it is sufficient. The position from *Lilly*'s Practical Register, only goes to what has been admitted throughout, that the time of an enrolment may be tried *per pais*, but that is only where it is no part of the record. The case in *Dyer*, I consider as of no authority; but as to the marginal notes appended to it, they bear unquestionable marks of having been added by some person eminent in the profession. The case in *Moore*, of the *Dean and Canons of Windsor*, and that of *Ludford* and *Gretton*, in *Plowden*, appear to have been the foundation of the marginal note to the case in *Dyer*, and I think it completely destroys the principal case.

Then, if this is a record, and I think it unanswerably is, the enrolment is recorded to bear date of the 22d of *July*, and concludes all question as to the erasure; and even if evidence were admissible, enough would appear to shew the enrolment to have been made on that day. If *Young* had been

1817.

The KING, in aid of REED and others, v. HOPPER and others.

been in the office on the 22d, when the deed was brought in, it seems to be admitted that it would have justified the date as of that day, and it would have been for all purposes an enrolment. In point of fact, however, he did not attend then, but it is proved that his servant received it into the office, and by his authority deposited it on his desk that night. It is quite clear, too, that the party desirous of having the deed enrolled had, by bringing in the deed, done all that it was in his power to do towards its enrolment.

It is then said that the deed was not brought in in office-hours, but there are no appointed office-hours established or recognized by the act, so that the party has the whole day in which to do it.

I was somewhat staggered by the argument, that it is not required by the act that the day of the enrolment should be recorded, but if it has always been the practice to insert the date, as it appears to have been, I think that is a sufficient answer. It certainly is a very convenient regulation that the date should be inserted, and whenever it is, it must be taken as forming part, and an essential part, of the record. The party, therefore, having done all he could towards the procuring this deed to be enrolled, and it having been accordingly recorded as enrolled on the day on which it was brought to the office, I consider that record as conclusive, and that all parties are bound by the effect of it, and consequently this rule must be made absolute.

WOOD,

1817.

The KING, in aid of REED and others, v. HOPPER and others.

WOOD, *Baron*.—My brother *Graham* having gone so fully into the question arising on this case, I might consider it sufficient for me to say, that I entirely concur with him; but in a matter of this very great importance, where the points have been expressly reserved for the decision of the Court, it is proper and necessary that I should state the grounds of the opinion which I now deliver.

The certificate of the enrolment of this deed of bargain and sale, offered in evidence, is dated the 22d of *July*. It is objected that that is not the true date, and that proof that it is not so is admissible, to shew that it was originally and properly dated as of the 24th, in which case the Crown's extent would be entitled to the preference, otherwise the bargain and sale would have priority. The questions then are, whether the enrolment of this deed is a record, and whether the date is part of it, and whether it is a record of such a nature as that evidence may be received to contradict it. It appears by the cases to be the opinion of all the judges, that it is such a record, and that evidence on an averment against it is not admissible. A distinction was attempted to be made in argument between the fact and the time of the enrolment; but the time of the enrolment is a material part of the fact of the record, and if so put in issue it might have been tried by the record. In the case of *Ludford* v. *Gretton*, in *Plowden* *, it is said, that "none can say that the King's charter was made or delivered

* Page 491 a.

1817.

The KING, in aid of REED and others, v. HOPPER and others.

at another day than when it bears date," (and the reason of that is as stated before, because it is matter of record, and therefore carries in itself absolute verity)—"no more than a man may say that a recognizance or statute-merchant or staple was acknowledged on any writ purchased at another time than when it bears date; for to aver that it was antedated, or that it was delivered or acknowledged after the date, tends to the discredit of the great seal, or of justice, or *of the officer of record who recorded the recognizance*, or the statute-merchant, and the like." Now, the enrolment of the deed, in the present instance, is a precisely similar case, and therefore you cannot, for the same reasons, aver that it is antedated, because it is an enrolment made by an authorized officer of a court of record, and so produced by him. Nothing can be stronger as affecting this point than the case in *Dyer*,* as ultimately considered and decided—(his lordship stated the case at length.)—The Court of Augmentations is not a court sitting in judgment, but merely an office of record; and as appears by the authorities collected in the marginal note to that case, it was held, that a deed, when enrolled, vested the interest with relation, and that you are estopped to say, that it is not enrolled according to its date, and the consequence of that doctrine in the case cited from *Moore* was, that the defendant there was ousted of his term. It is said in a note below to have been held in the Exchequer, E. T. 30th Eliz. that the delivery of a deed to be enrolled

* Duke of *Somerset's* case.

1817.

The KING, in aid of REED and others, v. HOPPER and others.

rolled in court makes it a record: *Manwood* denying the opinion attributed to him in the case in *Dyer*. Nothing certainly can be stronger than those decisions, to shew that a deed enrolled is to be considered as enrolled with relation to the day it came in. As to the cases which occurred between the statute of Hen. VIII. and the 16th year of Eliz. there is good reason that a party might be permitted to give evidence of the day of an enrolment having been actually made, because it was not the usage at that time to insert the particular day, and if a date was given in term time, it was general as of that term which has relation in law to the first day of the term. This inconvenience attended that practice, that if a deed was not in fact enrolled within six months, should that time have expired by the second day of term, yet if it were enrolled at any time before the end of the term, it would have been considered to have been enrolled as of the first day, and therefore it was that the courts permitted the true day of the enrolment to be given in evidence. As to the regulation adopted of inserting the precise date, I consider that the judges must have construed the rule as if it had been one of the requisites of the statute. And that is also recognised in *Comyns* (Bargain & Sale, B. 10. p. 64.) On that ground, therefore, I am clearly of opinion, that evidence ought not to have been received to contradict this record.

I shall say but one word on the question of deeds being to be considered as enrolled on the day

1817.

The KING, in aid of REED and others, v. HOPPER and others.

day of their having been brought in, although not then actually and *de facto* enrolled. I am of opinion that they ought to be considered, after enrolment, as enrolled of that day by relation; and the case of *Garrick* v. *Williams* is very strong on that point, where the Court of Common Pleas so held.

As to what has been said of office-hours, the act of parliament appoints no such time, and a party has the whole day to bring in his instrument for enrolment; and the officer appears in this case to have been aware of that, who for his own convenience, if he chose to be absent from the office, left a person there for the express purpose of receiving such deeds as might be brought to the office when he should not himself be there; and it is his duty to record the enrolment as of the day on which it is so brought in. The case of *Combes* v. *Inwood*, in *Hutton*, I will not advert to; but there is another case to be found in page 63 of the same book (*Jennings* v. *Pitman*), wherein it was decided, that in the case of those who claimed any estate of persons attainted in the rebellion, where they brought their conveyances to the Exchequer to be enrolled within one year, if they brought and delivered those conveyances it was sufficient, though they be not enrolled, for they have performed as much as was in them.

Then it is said that the officer had no right to alter this record as he has done; but it would be monstrous

1817.

The KING, in aid of REED and others, v. HOPPER and others.

monstrous if we, sitting in this Court, were to be examining into the records made by the officers of the Court of Chancery, for it would induce a clashing of jurisdictions; and the consequences would be absurd, for one Court might hold a deed enrolled on one day and another on some other: nor can we investigate the conduct of those officers over whom we have no controul, or inquire whether they have or have not done their duty. The Court alone by whom they are appointed can do that, but we must take the records as we find them, and are clearly absolutely bound by their import; and to me, in the present case, the enrolment appears to be recorded as made on the 22d of July.

RICHARDS, *Baron*. I shall be very short, as I am clearly of opinion that evidence ought not to have been received to contradict this record. The case of *Garrick* v. *Williams* is quite decisive on the point, and it was a much stronger case than the present; for there the officer added to the record four years after the granting of the annuity sought to be set aside, and the Court would not listen to any argument on the misconduct of the officer. The Chief Justice, who took time to consider his judgment, says expressly towards the end of it, that the memorial was conclusive, and "that no averment or evidence shall be received to shew that the date is incorrect;" and though the Court reprehended the conduct of officer, they decided that they were bound by it.

That

1817.

The KING, in aid of REED and others, v. HOOPER and others.

That case came afterwards before the Court of Chancery, on a bill for an injunction to restrain the annuitants from proceeding to execute a warrant of attorney. The bill * stated, amongst many other things, that the memorial was not properly transcribed; and on Mr. *Girdlestone*'s brief I find a short note of what the *Lord Chancellor* said on that occasion. After travelling through the other points, his lordship proceeds: "If the record have been altered contrary to what it ought to have been, application ought to have been made to the keeper of the records to make it right. At present the record is complete; but if any vice be in it, there may be an application to the Master of the Rolls for the purpose of altering it; but till that time it stands as a good record." The real question was, whether the annuity was enrolled within 20 days. An order was made that the clerk should attend with the memorial itself. Now there was no question of the fact that the deed had not been enrolled within four years, therefore the Chancellor could only have called for the record to see what had been recorded to have been done.

Eldon, Lord Chancellor, of the same opinion.

* *Eagle* v. *Garrick*.—On a former occasion the *Lord Chancellor* expressed himself in this case to the following effect: "This Court must consider the record of the memorial in the same point of view as a court of law, and in this case the Court of Common Pleas has decided that it is bound by the record of the memorial as it now stands: if so, this Court is equally bound, and I must refuse the injunction, leaving it to the grantor of the annuity to file a bill in this Court, for the purpose of having the record restored to its original state, if he shall be so advised.

The

1817.

The King, in aid of Reed and others, v. Herbert and others.

The application of the plaintiff in equity was refused at that time, and the Master of the Rolls, when applied to afterwards, also declined to interfere. That is certainly a strong case, and is bottomed on sound authorities. I do not presume to say that there are not modes of pleading by which a case may be made where evidence might be admissible in a court of equity, but on this record there is no such case. The issue is, whether this bargain and sale were duly enrolled, and the plea is supported by producing this record. By the Annuity Act, (53 *Geo.* III. ch. 141. sec. 7.) the day and hour are required to be enrolled. Here also the date is of the first importance, and ought to be inserted.

On the other point of the case, if we should have been of opinion that this evidence were admissible, I think it would be sufficient to support the plea. It is impossible to dispute that the lodging the deed in the officer's hands is an enrolment. And indeed the affairs of mankind would be in a dreadful condition if it were not so; for when the deed is once so lodged, the party interested in it loses all dominion and controul over it, and it is from that moment left entirely with the officer. If, as has been contended, an actual and complete enrolment were necessary, this deed has not been enrolled on the 22d nor on the 24th of July; but the cases all decide that that is not necessary, and that the instant a deed is lodged in the office, from that instant it must be considered as enrolled, and the practice accords with that rule.

It

1817.

The King, in aid of Reed and others, v. Hopper and others.

It is admitted in this case, that although the office-hours were over, if Mr. Young, or any clerk, were then there, the lodging the deed on *Saturday* the 22d *July* would have been sufficient; because, if a deed is received by the officers, it is sufficient: but who are the officers? Is there any particular person or persons named by the act to receive these deeds? Mr. Young is the chief clerk, and he, or other persons appointed by him, are there in order to receive the deeds that may be brought to the office. If he or his clerks receive a deed, either by themselves or by others, is it not precisely the same thing?

The moment you admit that it was received by Mr. Young at the office, that moment it became an enrolment. It is clear, that if not received by him personally, but by another *bonâ fide* appointed by him, and according to the usual course of the office, it is equally so. Why is it not equally in the office, if so received, as if Mr. Young himself had received it? Mr. Young was examined on the trial, and says, that the office-hours are not the only times when he received those deeds, and that he and his clerks sometimes attend after office-hours. If so, then there is no magic in office-hours. He states that it is the universal practice always to make the enrolment bear date the day it comes into the office; but the enrolment necessarily cannot take place until some days after; but the day on which it comes in is the day upon which the enrolment bears date. [His lordship then went through the leading facts of Mr. Young's evidence, and dwelt on the circumstance

1817.

The KING, in aid of REED and others, v. HOPPER and others.

circumstance of the porter being authorized to receive deeds brought in in his absence.] So that it appears that this porter was as much under Mr. Young's authority as any of the clerks. [He then adverted to the evidence of the clerk, who brought in the deed and left it with the porter.] Now suppose the porter had said he could not do it, then this young man would have gone to one of the clerks. It is impossible to say that the young man (the clerk) was in fault; if there was any negligence at all of the officer, it does not belong to him. [His lordship then applied himself to the consideration of the remainder of the evidence, and observed, that] Such being the facts of the case, and there being nothing of fraud to affect the question, I should conceive that this delivery of the deed in question, by this young man to the porter left in charge of the office, is as much a leaving at the office as if it were left with the officer himself, or any of his clerks. But then it is said, that there is no minute made of such delivery. That is only a plan adopted for the convenience of Mr. Young himself. Suppose the minute had not been made for a week, it might be asked, would that affect the enrolment? Certainly not. If the officer choose to trust to his memory as to the time when a deed is left, he has a right to do so. There is no injustice in saying that he may do it. He puts it down in order to remember the day of delivery. He puts it down in his minute or day-book, but that could not be more a public notice than the lodgment of the deed in the office; and if it be not absolutely necessary that the enrolment should be made

1817.

The KING, in aid of REED and others, v. HOPPER and others.

made at the time, (and I have heard no case cited to shew that it is so in point of law,) that which has been done, was in all respects sufficient. But in point of fact, how is any publicity given to the enrolment taking place, when the formality of enrolment is an act which may not be performed for a great length of time after the deed is brought in? It certainly was not intended for the purpose of making the matter public.

Upon the whole, it seems to me that the first point—that a record cannot be averred against having been decided to be law—makes the consideration of the other unnecessary; but if that were to be acted upon in the event of the other failing, I should conceive that the circumstance of the deed being lodged in the office with an accredited agent of the principal clerk or officer, in the absence of all fraud or other circumstances to impeach or affect it, is as good and as legal a delivery as if it had been handed to Mr. Young himself; and I am therefore of opinion that we should make this

Rule Absolute.

BADNALL

1817.

Saturday, 1st February.

BADNALL and another *v.* SAMUEL.

THIS was an action of *assumpsit* brought to recover the sum of 87*l.* 19*s.* 2*d.*, the balance claimed by the plaintiffs on a bill of exchange for 217*l.* 19*s.* 2*d.*, dated *Liverpool*, 6th *March* 1815, drawn by one *J. Henry* upon, and accepted by one *Thomas Ashton*, payable at Messrs. *Barclay* and Co.'s, bankers, *London*, three months after date, to the order of the said *J. Henry*, and endorsed by him to the defendant, and by the defendant to the plaintiffs.

The first count of the plaintiffs' declaration was on the said bill of exchange; and there were counts for goods sold and delivered, the common money counts, and a count on an account stated. The defendant pleaded the general issue.

The cause was tried before Mr. Justice *Dallas*, at the *Lent* Assizes for the county of *Stafford*, 1816, when a verdict was found for the plaintiffs for the said sum of 87*l.* 19*s.* 2*d.*; subject to the opinion of this Court upon the following case:

Where all parties have had due notice of the dishonour of a bill of exchange, a subsequent indorser is not discharged by a treaty between the attorney of the holder, the drawer (who was also prior indorser) and the acceptor, that the holder should wait a given time for the payment of the balance, in consideration of receiving from the acceptor and prior indorser, by a certain time, a stipulated proportion of the amount, *a part only of which properties was afterwards paid**; although the subsequent indorser has had no notice of such treaty, or the result, nor was informed of the payment of any part of the money due on the bill, or of the ultimate non-payment of the balance till some months after the original dishonour of the bill.

Sed vide, the subsequent indorser was the person to whom the holders had sold the goods for which the bill was given in payment, and the offer of a renewed bill, by the same parties, had been expressly rejected by them.

* Quere if the whole had been paid, according to the engagement of the party asking the indulgence of time.

1817.

BADNALL and another v. SAMUEL.

'The plaintiffs, in consequence of an order given, furnished the defendant with goods to the amount of 242*l.* 5*s.* 6*d.*, to be paid for by the defendant at twelve months credit. The goods were forwarded to the defendant at *Liverpool*, and were received by him there. The twelve months having expired, without any remittance having been received by the plaintiffs for the goods, they wrote to the defendant on the subject, and received from him an answer, inclosing the bill in question, advising—"Enclosed you have *Ashton* at *Barclay's* for "217*l.* 10*s.* 2*d.*, with which credit our account, "and when our advices arrive, should there be "any further orders we will acquaint you."'

'The account of the defendant was accordingly credited by the plaintiffs for the sum of 217*l.* 10*s.* 2*d.* and also for the further sum of 24*l.* 6*s.* 2*d.*, which last sum was paid to the plaintiff *Langharn* by the defendant, on the 20th *May*, 1815, and the accounts between the plaintiffs and defendant were then balanced by such last-mentioned payment.'

'The bill of exchange was duly presented at Messrs. *Barclay* and Co.'s (where it was made payable) on the day it became due, but payment was refused; the several parties to the bill of exchange being resident at *Liverpool*, the plaintiffs transmitted it to Messrs. *Haywood* and Co. bankers there, in order that it might be presented, with due notice of its dishonour, to all parties respectively; *and such notice was accordingly duly given to* J. Henry, *the drawer of the bill, and to the defendant.*

1817.

BADNALL and another v. SAMUEL.

fendant. In consequence of the applications which were made by the said bankers in *Liverpool*, for the payment of the bill, *Henry* wrote to the plaintiff (14th *June* 1815.)

"The draft, I find this day, has been returned. "I applied to Mr. *Ashton* to take up the same, "but he cannot do it for want of remittances; but "on *Saturday*'s post he will remit you 100*l.* in a "banker's bill, and the balance he wishes to be "renewed for two months, with interest and "charges. If you will have the goodness to accept "of this, you shall have my security to the renewed "bill, as well as Messrs. *Samuel* and Co.'s endorse-"ment. I have been disappointed in some cash "payments, otherwise I should have paid the ba-"lance. Please to acknowledge this by return of "post, and I will see the needful done for you."

In answer to this letter, the plaintiff, without further communication with the defendant, wrote to *Henry* on the 17th, as follows:

"In reply to your letter received this morning, "respecting the returned draft of your drawing, "which we received from Messrs. *Samuel* and Co. "value 217*l.* 19*s.* 2*d.*, and which it is very sur-"prising they did not immediately pay, we beg "leave to inform you that we shall on no account "agree to receive a draft for any part of it, re-"newed by the parties who have suffered this said "bill for 217*l.* 9*s.* 2*d.* to be dishonoured. A "regular banker's draft for the amount and ex-

1817.

BADNALL and another v. SAMUEL.

"pences, with interest, if it will be any accommoda-
"tion to Messrs. *Samuel* and Co. &c., we shall not
"object to it; but nothing except a regular draft,
"or bank notes, will we receive. If we receive a
"good draft for 100*l.*, as you propose, to be sent
"from *Liverpool* as this day, the same will be
"placed to the credit of Messrs. *Samuel* and Co.,
"and you may assure them, and be assured your-
"self as a party to the bill, that we shall return
"any other paper than as above described. We
"wait, therefore, an immediate and regular remit
"tance (only) for the full settlement of this dis-
"agreeable transaction; which unless we receive
"by return of post, legal measures will, without
"further notice, be resorted to for the recovery of
"our demand."

Messrs. *Haywood* and Co., having endeavoured without success to obtain payment of this bill, returned it to the plaintiffs on the 17th *June* 1815, in order that they might take such measures for recovering the amount as they should think proper.

After the bill had been so returned to the plaintiffs, they directed their solicitor to apply to the several parties to the bill for the payment of it, which was accordingly done by him; and *Henry*, the drawer, wrote to the plaintiffs the following letter, dated 20th *June*.

"Herewith I transmit to you Mr. *Thomas Ash-*
"*ton*'s letter, who will pay 100*l.* in cash, and
"requests of me to renew the balance at two
"months.

1817.

BADNALL and another v. SAMUEL.

"months. As you will have the same securities as "before upon the bill, I should recommend you to "take it, as you may depend upon its being duly "paid. I applied to Messrs. *Samuel* and Co. to "pay the balance, but they are short of cash as "well as myself, from disappointments of remit-"tances, otherwise I should have paid the balance. "If this meets your approbation, please to inform "me by return, and I will get you the 100*l.* in "cash, and the renewed bill sent you."

Ashton's letter to the plaintiffs, referred to in this last letter of *Henry*, was as follows:

"I am sorry to say that my acceptance for "217*l.* 19*s.* 2*d.* to *J. Henry*'s draft, has been re-"turned; the cause of which is want of remittances. "I at present will pay 100*l.* in cash, and request "the favour of an indulgence for the balance to "be renewed at two months."

In consequence of the directions of the plaintiffs, their solicitor wrote to *the house of the defendant*, (on 22d June,) in terms demanding payment of the bill and expenses, or threatening to proceed.

Other letters of the same date and purport were written by him to Mr. *Henry*, the drawer, and Mr. *Thomas Ashton*, the acceptor; and the following letter was then written by *Henry* to the plaintiffs, 24th June.

"In reply to the letter I received this day, I am

1827.

BADNALL and another v. SAMUEL.

"sorry it is not in my power to do more for you "than get 100*l.* in bank notes, and a renewal for "the remainder. If any proceedings at law take "place, Mr. *Thomas Ashton* positively says he "will not pay any of the bill until the law com-"pels him; therefore I would strongly recommend "you to take the 100*l.* and the renewal, as you "cannot be placed in a worse situation; and it will "oblige me by your taking the 100*l.*, when you "will have all parties on the renewed bill. If pro-"ceedings take place, you will not recover your "money until *November*, when you now can have "100*l.* paid immediately; therefore I should "strongly recommend you to the terms Mr. *Ash-"ton* proposes."

This last letter was answered by their solicitor, on the 26th June, as follows:

"Messrs. *Badnall* and *Langharn* have sent me "yours of the 24th; having put the business into "my hands, decline having any further communi-"cation with you otherwise than through me. As "to their accepting another bill from the same "parties, I see no advantage that could possibly "arise to them for so doing; they have all the "parties to the present bill. I must say, I rather "expected to have received the 100*l.*, as mentioned "in your former letter, and which I should have "recommended them to have accepted. Indeed, I "will undertake to say, that if you will send the "100*l.* by return of post, in Bank of *England* "notes, they will accept them, and wait for the

"remainder

1817

BADNALL and another, v. SAMUEL.

"remainder till the time a two months bill would "run from this day, with interest and all expenses; "provided the money and all expenses and interest "are paid in Bank of *England* notes. But this is "a proposition of my own, as they have given me "positive instructions to proceed; and you must "be well aware you are liable to an arrest any day, "as well as you seem to know that we could not "recover until *November*. Indeed, they have left "it entirely in my hands; and if, therefore, I re- "ceive 100*l.* we will then wait for two months for "the remainder, with interest and costs, to be paid "in bank notes."

This last letter was replied to, 28th *June*, by *Henry*, as follows:

"In reply to your favour, Mr. *Ashton* will re- "mit you 100*l.* on account of his acceptance, by "to-morrow's post, without fail."

Ashton wrote on the 29th *June*:—

"Inclosed you will receive in cash, notes, num- "bers as copied on the other side,—amount 80*l.*, "on account of my acceptance to *J. Henry*, draft "for 217*l.* 19*s.* 2*d.* due the 9th instant; and the "balance, 20*l.* as to promise, shall be remitted you "in one or two posts, according to your request of "the 26th ult. Please to acknowledge receipt of "the same."

To which the plaintiff's solicitor replied, 3d *July*:—

"I received

1817.

BARNASL and another, v. SAMUEL.

"I received yours of the 29th *June*, inclosing "only 80*l.*, and am surprised that you did not send "more; I expect the remaining 20*l.* in a post or "two, as my clients will not be trifled with."

During this last correspondence between the plaintiffs' solicitor and *Henry* and *Ashton*, *no application was made by the plaintiffs to the defendant*, but the correspondence was wholly confined to *Henry* and *Ashton*. But in consequence of no further notice being taken, subsequently to this last letter of the plaintiff's solicitor, by any of the parties to the bill, the solicitor wrote to *Henry*, *Ashton*, and the defendant, on the 5th *September* 1815, demanding from each of them payment of the balance due on the bill.

Henry replied to the last letter to him, as follows:

"In reply to your favour of the 5th instant, I "called upon Mr. *Ashton*, and showed him your "letter; he informed me he had received one this "morning from you upon the same subject, and "he has faithfully promised me, in all next week "he will remit you 50*l.*; and in all the next week "following, the balance. This I will see attended "to myself, so that he performs what he has this "day promised. When you receive the 50*l.* let "me know what your charges are; so that I will "see that attended to when he remits the last "payment.

The

1817.

BADNALL and another v. SAMUEL.

The following letter was afterwards received by the plaintiffs solicitor from Messrs. *Ingham* and *Ashton*:

"Inclosed is bill, 50*l.*, on account of my acceptance; the remains shall send you in the course of a few posts, twelve days. Please to acknowledge receipt of same."

To which he replied, 26th *September*, by an acknowledgment of the remittance, objecting at the same time to its shape.

The plaintiffs had altogether received 130*l.* on account of the bill, *viz.*; 80*l.* as above mentioned in *Thomas Ashton*'s letter to plaintiff's solicitor; and 50*l.* as above mentioned, in the letter from *Ingham* and *Ashton*.

These sums were received from *Thomas Ashton*, the acceptor, on account of his acceptance of the said bill of exchange, *without notice to, or the assent of the defendant*, respecting these payments. Since the second payment, so made as above mentioned, *Thomas Ashton*, the acceptor, became bankrupt. There remains a balance of 87*l.* 19*s.* 2*d.* (for which this action was brought) still due to the plaintiffs on the bill of exchange.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover this balance from the defendant. If so, a verdict was to be entered for them accordingly: if not, then a nonsuit.

Puller,

1817.

BADNALL and another v. SAMUEL.

Puller, for the plaintiff, contended, that in the present case it was quite clear that there had been no new security given to the holder of the bill, nor time given to any of the other parties liable on it, so as to discharge the others, the plaintiffs had not foregone their right to sue the present defendants for the balance, by what had been done in the way of treaty between their solicitor and the other parties to the bill. The points ruled by *Eyre*, C. J. in the case of *Walwyn* v. *St. Quintin* (*a*), are more immediately applicable than those of any other case in the books, to the questions arising in the present. It was there said by his Lordship,—"*Proposals* for a security bind no one, unless they can be made use of to impute laches: and after protest, no laches can be imputed." And again, (citing the note of *Johnson* v. *Kenyon*, B. N. P.) his Lordship says, "where timely notice is given that the bill has not "been duly paid, the receiving part of the money "from the acceptor or indorser will not discharge "the drawer or other indorsers (*b*)." These are the points in the present case. In *Edgell* v. *Darley* (*c*), Lord *Eldon* held, that "as long as the holder is passive, all his remedies remain." In all the cases (*d*) where other parties, originally liable, have been held discharged, either a new *security* has been given to the holder, or time given

(*a*) 1 B. and P. 654.

(*b*) Gould v. Robson. 8 East, 580.

(*c*) 2 B. and P. 62.

(*d*) Vide Barnes's 3d edition of Bailey on Bills, pages 152 to 157, where the cases are brought together.

to

to some of the parties liable, *to the delay and prejudice* of the parties held discharged. Here a proposed new security was expressly refused.

1817.

BADNALL and another v. SAMUEL.

Peake, *contrà*, contended, that the plaintiffs had, *in effect*, given time to a prior endorser and the acceptor, to the delay and prejudice of a subsequent endorser, who was entitled to consider that, between the 9th *June*, (when he received notice of the dishonour of the bill,) and the 5th of *September*, (when he was first informed that there remained a balance due,) the bill had been wholly paid. Such delay must have the effect of lulling a subsequent indorser into security, and might defeat his measures against the acceptor or drawer. It was laches, even after the notice given in the first instance. There having been no laches on that occasion can not cure subsequent laches. Forbearance towards an acceptor, *after* duly noting and protesting a bill, may be as prejudicial, ultimately, to other parties liable, as forbearance *before*, which it is clear would be a discharge. The defendant had no notice of any of the subsequent transactions between the parties. The acts of the attorney were the acts of the plaintiff; and the defendant should have been informed of what steps had been taken; the more so, as a part of the money had been actually received, which it was otherwise the plaintiff's duty to have returned. In *Gould* v. *Robson* (*e*) Lord *Ellenborough* held, that if the holders of a bill receive a part from the acceptor and agree to wait, it is a

(*e*) 8 East, 580.

giving

1837.

BADNALL and another v. SAMUEL.

giving time, which precludes them from proceeding afterwards against the other parties; and that all arrangements made by a holder are at his peril. In *English* v. *Darley*, the endorser was held discharged, when the plaintiff, who had got an *execution* against the acceptor, took *his single* bond and warrant of attorney only, for securing the payment of the money by instalments. And in *ex parte Smith*, (there referred to,) it was considered, that the holder of a bill discharged an endorser merely by entering into a composition with the acceptor; and courts of law have always proceeded, with respect to those securities, on the same principle as courts of equity. The case of *Walwyn* v. *St. Quintin*, was a question between the holder and *drawer* of an *accommodation* bill, and therefore distinguishable. The present case, on the whole, is a much stronger case altogether than any of those wherein it has been ruled that time given to one of the parties liable, discharges the rest. Although the proffered new security was not in fact accepted, yet the full time was agreed to be given; and more was in fact given by the holders, and clearly to the prejudice of the endorser, and without his consent or knowledge; and therefore he was discharged from his liability.

Puller, in reply, was stopped by,

GRAHAM, *Baron*.—This is a very clear case. (His Lordship stated the material facts, and commented on the effect of the correspondence.)—Thus it appears that all parties had notice of the dishonour

1817.

BADNALL and another v. SAMUEL.

dishonour of the bill in due time, and were put on the alert; and each of them were so far, therefore, fixed.

I think there is good sense in the rule laid down in the case cited, (*English* v. *Darley*,)—that "as long as the holder (of a bill) remains passive, all his remedies remain." Now in this case, whatever measures had been adopted to obtain payment of any part of the amount of the bill in question from any of these parties, they would operate in favour of all the others; and it must be a strong case to discharge other parties where all that it was possible to get from the acceptor has been got from him by any one of them. All the cases go on the circumstance of the creditor having singled out some one of the persons liable, and discharging the others by some binding and conclusive act; as, by taking a new security as a warrant of attorney from him, or taking and using another negociable bill, when it might happen that he might afterwards actually in the mean time recover, on the bill which had been originally dishonoured, the money which might perhaps also be paid on the second bill becoming due. (His Lordship here read the several letters.)

Then what was the effect of the proposal which was made by the letter of the 26th *June?* It was, that if 100*l.* were remitted by return of post, the plaintiffs would wait the time that a bill at two months would then have to run.

Now if the 100*l.* had been paid, according to that

1817.

BADNALL and another v. SAMUEL.

that proposal, some difficulty might have been thrown on the case; at least I should then have hesitated in saying, that that agreement had not precluded the plaintiff: but that agreement was not performed, for only 80*l.*, in fact, was sent in due time; nor was the 20*l.* afterwards remitted, so that the plaintiff was then discharged from the observance of his proposal. And I am of opinion that he has done nothing to relinquish his legal right to sue the defendant. Therefore there must be judgment for the plaintiff.

Wood, *Baron.*—I am of the same opinion.—This defendant was, in fact, the principal debtor; for the goods had been sent to him, on his account, and he it was who gave this bill of exchange to the plaintiffs in payment for them.—(*His Lordship stated the circumstances.*)—Due notice having been given of the dishonour of the bill, all parties became liable; and it was then at the plaintiff's option to proceed against all or any of them, and his selection of any one of them for that purpose would not operate to discharge the rest.

All the parties having thus become liable by the notice of dishonour, there must have been something done subsequently by the holder, to discharge the indorsers; but nothing was done here to preclude him from proceeding against the defendants as he has done. He made no new contract which could preclude him, or take away his right of suing the defendant.

There

1817.

BADNALL and another v. SAMUEL.

There was indeed a proposal made, but that was not complied with; if it had, it might at least have given occasion for argument, that time had been given; but that, I think, would not have been conclusive, and it would have been questionable whether it were binding on the parties, for want of consideration. Here, however, the condition was never complied with, and the plaintiff was then entitled to proceed against the defendant.

RICHARDS, *Baron*.—The question is, whether time was given to the acceptor to take up the bill, so as to discharge the indorser. If there had been time given, I should think it would have discharged the indorser; but in this case I think that time was not given. There was a proposal to indulge the acceptor with time to pay the remainder, on condition of receiving 100*l.* in part.—(*Reads the letter of 26th June.*)—By a subsequent letter, the plaintiff dispenses with insisting on the condition of a remittance in Bank of *England* notes; but still he rejects the payment of 80*l.* in part, as being a performance of the condition, for that was not the bargain made. There was, therefore, no conclusive engagement to give the acceptor time. The conditions of the proposal to do so were never complied with. If that engagement had been complete, there might have been more difficulty in the question; as it is, I am of opinion that the plaintiffs are entitled to their verdict.

Postea to the Plaintiff.

1817.

4th February.

The KING, in aid of GREATRIX and others, v. KINNEAR.

A defendant taken into custody under an extent in aid (the sheriff having also seized his property, being more than sufficient to cover the demand) ordered to be discharged.

Where his property (seized and returned) is ordered to be restored to him on his giving approved security, and it is delivered up by the sheriff before the security be approved, the remedy must be against the sheriff for not having the property forthcoming, not against the party for not giving such security.

SPANKIE shewed cause against a rule which had been obtained by *Stephen* calling on the defendant in this extent to shew cause, within a week after service of the order, why an attachment should not issue against him for contempt in not delivering over to the sheriffs of *London* certain bills of exchange mentioned in a schedule annexed to an inquisition which had been returned by the sheriff, pursuant to order of Court of the 15th *Nov.* last *; and also for not complying with that order.

The facts were, that the defendant was examined on the inquisition taken on the 21st Nov. when he admitted having bills of exchange in his possession amounting to more than the debt, but he refused to deliver them up to the sheriff. The defendant had not entered into the security. It was submitted that the order as to giving security was optional, and that therefore, his not having done so did not amount to a contempt of Court; and for that the case of *Fricker* v. *Eastman (a)* was cited. It was also contended

* That order had been obtained on a motion made by *Dauncey* for the discharge of the defendant, whose person had been taken under the extent, out of custody, on an affidavit that the sheriff had, besides taking the defendant in execution, taken possession of certain premises of the defendant; and it was made absolute, after cause shown by *Richardson*

(a) 1 East, 319.

1817.

The KING, in aid of GREATRIX and others, v. KINNEAR.

contended that the defendant was not bound to deliver up the bills of exchange.

Stephen, for the prosecutors of the extent, insisted that the conduct of the defendant amounted to disobedience of an order of the Court, and that the only remedy was by attachment, which he prayed might be ordered; but,

The Court expressing disapprobation of attacks on established practice, intimated that in all cases the strict severity of rules should be mitigated. The sheriff having restored the property returned by him as seized, and which ought to have been in his hands, was still responsible for them, and therefore the prosecutor had mistaken his remedy by the present motion as against *Kinnear*, which, they observed, was one that ought not to have been made or encouraged.

Rule discharged, with costs.

Richardson for the discharge of the defendant's person. The Court also ordered (by consent) the liberation of the defendant's goods, on his giving such good security, in double the amount of the debt sought to be recovered by the extent, as should be approved by the officer of the court; and undertaking to bring no action.

1817.

Wednesday, 5th February.

5 Com B N S 133

ROBINSON *v.* WILKINSON.

A creditor is entitled to sue a dormant partner of his debtor—if unknown to him to be so at the time of furnishing the subject matter of the debt—for whatever had been supplied to the firm during the partnership.

It is not an answer to the circumstance on which the reason of the rule is founded—the partnership not having been known to the plaintiff—that it might have been known to him if he had used diligence, inasmuch as the defendant (the partner not originally known) had been a *registered* part-owner of the ship on account of which the goods had been supplied, at the time, because the register is not readily accessible, nor conclusive when found.

None of the acts done by an ostensible partner, which are usually held to operate to discharge the others—such as selecting one, accepting new bills, &c.—will operate to discharge a partner not known to the creditor, if done during the time of the concealment of such partner.

IN this case, which was an action of *assumpsit* for goods sold and delivered, a verdict had been found for the plaintiff, (Hants Sum. Ass. 1813,) damages 449*l.* 10*s.* 5*d.*, costs 40*s.**, subject to the opinion of the Court on a case, which was in substance as follows:—The plaintiff was an agent and ship-chandler at Portsmouth. The defendant, and *Christopher John Cay*, before and in the beginning of the year 1810, were *registered owners* of the ship *Lord Eldon*, of which *Ralph Symes* was master. The defendant continued a part-owner till the 15th of *June* 1810, when he sold his interest in her to Mr. *Cay*, who then became the sole registered owner of the ship, and continued owner during the whole time in which the debt due to the plaintiff was contracted; in the months of *May*, *June*, *July*, and *August* 1810, the ship

* The verdict was afterwards altered to 401*l.* 16*s.* 1*d.*, the precise amount of the debt due at the time the defendant ceased to be a part-owner. The account stood thus: Goods supplied, 21*l.*; cash, 376*l.* 18*s.* 5*d.*; balance of former account, incurred whilst defendant was at Portsmouth, 3*l.* 17*s.* 8*d.*—401*l.* 16*s.* 1*d.*

being

1817.

ROBINSON v. WILKINSON.

being at *Portsmouth*, the plaintiff supplied her and the captain with stores and cash on account of the ship, to the amount of 1,014*l.* 5*s.* 4*d.*

The amount of the debt up to the time when the defendant ceased to be a part-owner, was 401*l.* 16*s.* 1*d.* (*See the note* * p. 538.) The master drew bills, dated 2d *August* 1810, on the ship's agents in *London*, for 264*l.* 5*s.* 4*d.*, and 750*l.*; total, 1,014*l.* 5*s.* 4*d.*, the whole amount of the plaintiff's demand. After these bills were drawn and sent for acceptance, *Cay* wrote to plaintiff to say the demand would be settled, but requested he would withdraw the bill 750*l.*, and draw on him for it at three, four, and six months, which plaintiff did on 3d *November* 1810, when he wrote to *Cay* the following letter:

"Yours, without date, I received on *Saturday*, "and have valued on you as on the other side," (alluding to a statement on the other side of the letter of the amount of the sums for which the three new bills were drawn,) "and past the several "drafts through my banker's hands, which I "should hope would be duly honoured; I as- "sure you it's quite contrary to my mode of doing "business; and you must be aware it's not regular "to renew bills, particularly to six months; and "you will not fail giving directions to Messrs. *Welbank* and *Petit* to accept the other drafts, "as I cannot think of renewing them.

"I shall return you captain *S.*'s draft when I "have your acceptance."

1817.

ROBINSON v. WILKINSON.

The other drafts alluded to in the above letter were the bill for 264*l.* 5*s.* 4*d.* above stated, and which was not then due; and another bill for 68*l.* 2*s.*, which had been drawn for some articles furnished by the plaintiff in *August* 1816, and which were not included in the 1,014*l.* 5*s.* 4*d.* These bills were paid, but the three bills which were given in lieu of the one for 750*l.* were dishonoured by *Cay*, who proved to be insolvent; and to prevent his bankruptcy he proposed to the plaintiff to pay him a composition or dividend of 13*s.* in the pound, secured by the acceptance of his friend, a Mr. *Wilson*, of *Bishops Wearmouth*, (a partner in the firm of *Spence* and *Wilson*,) for the balance due, which the plaintiff agreed to take in full discharge of such balance. This acceptance not being transmitted so soon as expected, the plaintiff's attorney, on the 8th *May* 1811, sent the following letter to Messrs. *Spence* and *Wilson*:

"Mr. *Robinson* has been with me again re-
"specting his demand, and is somewhat distressed
"at the apparent neglect paid to the business; I
"must therefore beg of you most earnestly that
"you write me, by return of post, the reason of
"delay in the payment of the dividend by the re-
"mittance of the promised bill."

After this letter *Wilson* accepted a bill drawn by *Cay* for 13*s.* in the pound, of the demand payable at eight months after date, which was sent to the plaintiff.

This

1817.

ROBINSON v. WILKINSON.

This bill, which was negociated by the plaintiff, was also dishonoured, both drawer and acceptor having become bankrupts before the bill was due, and no part of the amount has been received.

At the period of these several transactions, the plaintiff considered *Cay* as the sole owner of the ship, and did not know that the defendant was a part-owner; immediately on his discovering this fact he made a demand on him, and he refusing payment, this action was brought: the writ was issued in *September* 1812.

The defendant contended that he was discharged from the payment of any part of the demand. The plaintiff insisted that the defendant was liable to the whole demand due when he ceased to be a partner; and that if he were entitled to any credit on account of the bill for 264*l.* 5*s.* 4*d.* it was only to the sum of 21*l.*, the amount of the plaintiff's claim on account of goods supplied by him to the time of the defendant's ceasing to be a part-owner of the ship.

Gaselee, (abandoning the question on the 21*l.*) insisted that the plaintiff was entitled to keep his verdict for the remainder, for that the present case was distinguishable from all those which go to determine that the acceptance by a creditor of one of several partners, as his debtor, works a discharge of the rest; because it is found as a fact, in this case, that the plaintiff, at the time of furnishing the goods supplied, was ignorant that the defendant

1817.

ROBINSON v. WILKINSON.

had been a partner of *Cay*, the insolvent. It is said by Lord *Mansfield*, in *Hoare* v. *Dawes* (*a*), to be clear law that dormant partners are liable, when discovered; and on that rule the plaintiff relies.

Lawes, *E.*, *contrd*, submitted that the plaintiff could not avail himself of that want of knowledge in this case, even if it gave him a right to recover; because, as it is found that the defendant was a registered owner of the vessel, the plaintiff might have known it, and ought, therefore, to have made himself acquainted with the fact of what persons were the owners of the vessel when he supplied her with stores.

It was then contended that another insuperable objection was opposed to the plaintiff's right to recover in the present action against this defendant, and that arose from his having taken *Cay*'s sole bill, and his having allowed him to renew it when it became due. For in the case of *Read* v. *White* (*b*), it was held by Lord *Kenyon*, that a plaintiff dealing with one partner separately, adopts him to the discharge of the others. In that case a bill had been drawn on and accepted by one of several partners, and being dishonoured was renewed by him alone. In the case of *Evans* v. *Drummond* also (*c*), it was ruled by the same authority, that after even a joint bill has become

(*a*) Doug. 356. (*b*) 5 Esp. N. P. C. 122.
(*c*) 4 H. 91.

due,

1817.

ROBINSON v. WILKINSON

due, if the holder take the separate bill of one, he discharges the rest. But this case goes farther, for the plaintiff afterwards accepts the security of a third person, (*Wilson*) by the bill drawn on *Wilson* and accepted by him, and such acceptance by a third person has been decided to be a satisfaction, otherwise it would have been a fraud on *Wilson*, according to the case of *Steinman* v. *Magnus (d)*.

To oppose the point made on the fact of its not having been known that the defendant was a partner, the case of *Newmarsh* v. *Clay (e)*, was cited as establishing, that an unknown partner was discharged by the delivering up of old dishonoured bills, and receipt of others. The fact of some part of the *whole* demand having been paid was adverted to as raising a question of appropriation, and particularly as to the bill for 264*l.* 5*s.* 4*d.* which had been actually paid. And the case of *Dubois* v. *Schroder (f)*, was cited to shew that a defendant might plead in abatement, that he had a partner, although he were a secret one, and the plaintiff could know nothing of it.

Gaselee in reply, relied on his former position, and contended that the ship's register would not charge a person named therein as part-owner, *Tinkler* v. *Walpole (g)*. To hold that a man

(*d*) 2 Camp. 125. 11 East, 390.
(*e*) 14 East 239.
(*f*) 14 East, 226.
(*g*) 1 Marsh. 264.

1827.

ROBINSON v. WILKINSON.

must know all the parties connected with the person with whom he contracts, before he sues, would render it impossible to proceed against any person who had a dormant partner. The case of *Newmarsh* v. *Clay* does not apply. The question there was merely as to the effect of a specific appropriation, and that being decided as it was by that case, the plaintiff had been overpaid during the period of the defendant's partnership. As to all the other cases, the distinction here is, that the partner was unknown.

GRAHAM, *Baron*.—The fact of this defendant *Wilkinson* not being known to be a partner at the time the goods were furnished, certainly goes a great way to decide the several points of this case, and distinguishes it from most of those which have been cited for the defendant. In general, a release of one partner is a release of all, but a party has always a right against a concealed partner of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault, as if he had not used due diligence in finding him. But it is not to be expected that the plaintiff must search for a ship's register all over the kingdom, which after all is not conclusive.

Then it is said that the plaintiff discharged the defendant by accepting the bill drawn on *Wilson* by *Cay*.—Had *Wilson* fulfilled his engagement it would have been a discharge, but on his failing to do so, the debt against *Cay* remained undischarged,

changed, the plaintiff had a right to resort to his original remedy, which was then revived against all persons primarily liable.

The case of *Newmarch* v. *Clay* was one very differently circumstanced, and raised a different question, which was answered by the fact of the debt of the unknown partner having been satisfied out of money clearly appropriated to its payment at the time.—In this case that goes only to the 21*l.* and that sum must be deducted, and the balance will be what the plaintiff is entitled to recover.

WOOD, *Baron*.—(Having shortly stated the facts of the case.) This defendant was not known to be a partner when the goods were supplied, but as soon as his partnership is discovered the plaintiff sues him. And there is no doubt that in respect of the stores furnished during the period of his partnership he is liable. Then it is contended, that the drawing these various bills discharged the defendant. And so it would if they had been paid, but drawing bills which are afterwards dishonoured is no discharge. As far as they were paid they are a discharge, and therefore the 21*l.* must be allowed. If *Cay* had been discharged, the defendant as his partner would have been discharged, but that was not so here.

RICHARDS, *Baron*, of the same opinion. The question is, whether this defendant is discharged by any thing that has taken place. Whatever effect any

1817.

ROBINSON v. WILKINSON.

any or all of these transactions might have had if *Wilkinson* had been known to be a partner of *Cay*, is entirely put out of this case, because the plaintiff certainly dealt entirely with *Cay*, and knew nothing of *Wilkinson*, who was nevertheless clearly *primâ facie* liable.

It is clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner. If it were otherwise, and this action be not maintainable, a door is widely opened to defraud creditors by means of dormant partnerships.—If the plaintiff had originally known that this defendant had been a partner he would not have dealt with *Cay* alone, or if he had discovered it earlier he would probably not have done many of those acts which, without such knowledge, he has done.

It is quite clear that this verdict ought to stand for the 380*l.* 16*s.* 1*d.*

Postea to the plaintiff.

1817.

Friday, 7th February.

Nugent and another v. *Clent* and another.

An actual possession given to a factor by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of it.

Such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by the bankrupt.

Nor is a delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, and requesting him, on the faith of such consignment, to accept bills (which he accordingly accepts and pays), such a constructive delivery to a consignee as will give him a lien against the assignees—it is not within the principle of the cases, which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien not perfected by possession.

Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment, are not equivalent in effect to bills of lading endorsed.

THIS was an action of *assumpsit*, brought by the plaintiffs as assignees of *Disston*, a bankrupt, for money had and received to their use, and upon an account stated with them as assignees.

The defendants pleaded the general issue, and the cause came on to be tried at the last summer assizes for the county of *Gloucester*, when the jury found a verdict for the plaintiffs for 461*l.* 14*s.* 10*d.* subject to the opinion of the court, upon the following Case:

Disston, the bankrupt, previous to his bankruptcy, was a miller and mealman, carrying on his trade at *Nafford Mill*, in the county of *Worcester*; and the defendants, who were resident at *Bristol* for a few months before his bankruptcy, his factors, under a *del credere* commission for the sale of flour made at his mill. On the 16th of *October* 1813, *Disston*, in consequence of permission before granted to him by the defendants, drew a bill of exchange on them at two months for 335*l.*, which was on the same day accepted by them, and afterwards paid. On the 20th day of the same month, *Disston* sent to the defendants the following letter:

" Gentlemen,

1817.

NICHOLS and another v. CLENT and another.

"Gentlemen,—I received your favour, and note the contents; as our markets are no lower, and I hope you will get out at 77*s.* I shall send you 100 sacks, of fine, mostly on *Friday* by *Brown*, and the remainder on *Monday* night from the mill; I don't know whether he will send two trows or not, at present; I shall have about 200 sacks in the whole, but will write you more particularly to-morrow."

The 182 sacks of flour, which were afterwards sent by the bankrupt, are those which are alluded to in this letter.

On the following day, the 21st of *October*, *Disston* drew another bill on the defendants at two months for 76*l.* which was accepted by them on the 23d of *October*, and afterwards paid; and on the 22d of *October* he addressed and sent to them the following letter:

"Gentlemen,—I have sent you by *Brown's* barge to-day, 55 sacks of good old fine Lammas flour, and 40 of very good Lammas seconds, there will be 50 or more, when dressed; shall have enough to make up about 200 *Friday*, for the barge on *Monday*, if we are not stopped, as I hope we shall not; but we had a deal of rain yesterday. I have drawn a bill on you at two months, in favour of *Ricketts, Thorne & Co.* for 76*l.*, which I should be obliged to you to accept. I intend to be down on *Wednesday* about the time the flour is likely to be in. It will be mostly Lammas seconds, and mixed; I shall have no cone."

On

1817.

NICHOLS and another v. GLASS and another.

On the same day *Disston* the bankrupt put on board a trow belonging to one *Brown*, at *Nafford Mill*, 54 sacks of fine Lammas flour, and 16 sacks of Lammas seconds; and on the 26th a further quantity, making in the whole 182 sacks of flour; but there was no invoice of either quantity of flour; nor were there any directions given to the trowman as to the person to whom it was to be delivered.

At the time the flour was put on board, it was entered in the bankrupt's book, by his order, "per *Brown* of *Tewkesbury*." It was denominated in the trow bill, "*Disston*'s Flour;" and *Disston* was charged with and paid the freight for it. The flour was landed on the 28th of *October*, at a wharf at *Bristol*, belonging to a person who acted as agent for the owner of the trow, being the place where goods brought by his trow were usually landed. After the flour had been put on board the trow, the bankrupt himself went to *Bristol*; and on the 29th of *October* he there gave an order to the wharfinger to deliver the flour to the defendants, and in pursuance of such order it was delivered to them on the same day.

Disston committed an act of bankruptcy on the 27th of *October* 1813, and on the first of *November* in that year, a commission of bankrupt was duly awarded and issued against *Disston*, under which he was duly found and declared a bankrupt, and his estate and effects were assigned to the plaintiffs.

The defendants sold the flour for 607*l.* 17*s.* and received the produce thereof, and paid over to the plaintiffs

1817.

Brewer's and another v. Clarke and another.

plaintiffs as assignees, the sum of 146 *l.* 12 *s.* 2 *d.* before the action was brought, claiming to retain the balance of 461 *l.* 14 *s.* 10 *d.* for the amount of the said two bills of exchange, and some other small sums due to them from the bankrupt, and their commission on the sale of the flour in question, amounting to 22 *l.* 15 *s.*

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover the whole, or any part of the said sum of 461 *l.* 14 *s.* 10 *d.* for which the verdict was taken.

Richardson, for the plaintiff, contended, that under the circumstances of this case, the transaction between the parties amounted to merely an executory agreement, which, for want of ultimate completion by subsequent possession of the goods, vested no property in the defendants, nor gave them any lien on the goods. This, he submitted, was a transaction between principal and factor, not between vendor and purchaser, and that there was nothing to fix these particular consignments till they came into the actual possession of the defendants. A factor has a general lien certainly when his principal's goods have once come into his possession, but he has none till then. Even that lien may be lost by loss of possession. The general principle, that possession is necessary to give a factor his lien, is fully established by the case of *Kinloch* v. *Craig*, *(a)*. In the present case there was no actual possession by the defendants till after the act of bankruptcy had been committed by *Disston*, when

(a) 3 T. R. 119.—and 783.

all

1817.

Nicholls and another v. Clent and another

all property in the flour had become vested in his assignees. The debt, on the other hand, was due to the defendants, not from the assignees but from the bankrupt.

It still, however, was contended, that the putting the goods on board the trow was a delivery; but it was no such thing, nor would it have been a delivery even if a bill of lading had accompanied them, for they might then have been stopped at any time in *transitu* by the consignor. If they had been burnt or sunk in the *Severn*, *Disston*, not *Clent*, must have borne the loss. All the facts of the case are *indicia*, which shew the property to be in *Disston* till he transferred it, and he might have ordered the goods to have been delivered to any other person in *Bristol* whom he chose; but any such order at that time, which was after the act of bankruptcy, would have been wrongful, as against creditors, and therefore clearly void, and could not bind the assignees. As to any hardships in the case, that cannot be used as an argument on a point of law. In the case of *Wilson* v. *Balfour* (*b*), Lord *Ellenborough*, delivering judgment against the defendants, expressed himself as considering it a case of extreme handship on them, but that the rules of law must prevail, and accordingly decided, that, where bankers had fraudulently sold out stock, the property of a customer, standing in their names, as a security for which they deposited bonds wrapped up in an envelope,

(*b*) 2 Camb. N. P. C. 481.

where

1817.

NICHOLS and another v. CLENT and another.

where they lodged the securities belonging to other persons who dealt with them, and which on the eve of their bankruptcy they sent to him;—such customer could not retain the bonds against the assignees; and that because the whole rested merely in intention till the eve of the bankruptcy, and because the defendants never had actual possession of them till then. That was a much stronger case than the present, for what was done there was done in contemplation only of bankruptcy. Here, the bankruptcy was complete; and in the present case, also, there was never an actual or even a virtual possession of these goods by the defendants till after the bankruptcy of *Disston*. In the case of *Sweet* v. *Pym* (*c*), it was decided, that after delivery of goods to a carrier to be conveyed on account, they could not be stopped in *transitu*, so as to affect a reviver of the original lien which the party had on them while they were actually in his possession.

Another question arising on this case is, whether the defendants, as factors, are entitled to a lien for their commission on the sale of the flour, and are entitled to retain the sum charged against the assignees, by whom they had not been employed. A factor has only a lien on the commodity, which entitles him to keep it against his principal. By retaining the charge for commission, the defendants admit themselves to be factors; but it is clear that the bankruptcy of *Disston* had the effect of countermanding the order to sell the goods, and

(*a*) 1 East, 4.

therefore

1817.

NICHOLS and another v. CLENT and another.

therefore they can have no right to charge commission for doing that which they had no authority to do.

Taunton, W. E., contrd, (admitting this to be a case between principal and factor,) insisted that the plaintiffs were not entitled to recover either of the sums for which the action had been brought. The present action, he submitted, was, both in substance and in form, (*assumpsit* for money had and received,) an equitable action, and founded on an equitable right, and could not be maintained against an opposite equivalent equitable right in the party defendant. The bills, in the present case, had been drawn for a very considerable sum, and had been accepted by the defendants, expressly on the faith of these very consignments to be made to them of the cargoes of flour sent to *Bristol* for their indemnification. The strength of the defendant's case consists in the fact and purport of the letters which had been written to them by *Disston*, at the time when he shipped the flour, and their effect, as giving a decided character, in point of law, to this whole transaction. At the time when those letters were written the defendants had obviously contemplated the possibility of *Disston*'s bankruptcy; and on accepting his bills, had prudently and fairly stipulated, as they legally might, for the consignment of the flour to them, as an indemnification against such an event. Those letters speak of and describe, specifically, these very cargoes sent by the same trow and master as are mentioned by name in the letters, and that for the avowed purpose of meeting these acceptances. Coupled with those letters, the delivery to *Brown* was a delivery to the defendants;

1827.

Nichols and another v. Clent and another.

and it was a delivery before any contemplation of bankruptcy by *Disston*. That was the substantial delivery, though afterwards perfected by—what was, under the circumstances, a mere formality,—the order given by *Disston* to *Brown*, at *Bristol*, to give the defendants possession. It was that very act of *Disston*'s going to *Bristol* on that occasion on which his bankruptcy was founded; and it would be strange that that order should have the effect of putting the defendants in a worse situation than they would have been in without it. An interest had become vested in the defendants in the flour, on such delivery to *Brown*; and that interest could not be divested by the subsequent act of bankruptcy; for on having been once put on board for the purpose declared by the letters, they became clothed with a trust for the benefit of the consignee; and his lien attached then, and the subsequent order to deliver, was not necessary, but altogether nugatory, or, at most, a formality. The letters would have been a sufficient authority to *Brown* to deliver the goods to the defendants, and perhaps stronger than a bill of lading would have been, because they stated the consideration for the delivery; and the more so, as it is not the practice to make out bills of lading with goods sent by the *Severn* trows; and such letters as these stand consignees in better stead. No subsequent countermand of *Disston*'s would have been good as against the effect of those letters, and *Brown* would have done wrong to have preferred any such countermand to them, as he might, by so doing, have rendered himself liable to an action by these defendants.

Previous

1817.

NICHOLS and another v. CLENT and another.

Previous to citing the cases brought together in support of these propositions, on the part of the defendant, the grounds of the decisions relied on for the plaintiff were thus attempted to be distinguished from those of the present case. The case of *Sweet* v. *Pym* was said not to apply, in any respect, to support the plaintiff's arguments, but was rather the other way, because there the Court held that the delivery to the captain of the vessel on the behalf of the bankrupt, was equivalent to a delivery to him, and on that ground the decision proceeded. In *Wilson* v. *Balfour*, the whole transaction originated with the bankrupts, in contemplation of their immediate bankruptcy, without any act on the part of the defendants expressive of their concurrence; and the judgment of Lord *Ellenborough* was founded on the basis of the whole *resting in intention*—the possession never having been out of the bankrupts. Nothing was done in that case to appropriate the bonds, and they might at any time have changed their destination; nor did the defendant know any thing of the transaction, and nothing was done by him in the way of consideration for the bonds, for he had not assented to their application of his stock to their own use. None of those circumstances of objection occurred in the present case. The case of *Kinlock* v. *Craig* was admitted to press more strongly against the defendants. In that case, however, there had been no letter written by *Steine* to *Sandiman* and Co. *specifically* appropriating the cargo, or stating that the consignments were made in consideration of the acceptance of the bills. It was, moreover,

1817.

Nicholls and another v. Clent and another.

moreover, a very distinguishing fact in that case, that *Sandiman* and Co. had originally, as a point of honour, refused to receive the goods, or to suffer them to be unloaded on their account, because they had then become bankrupts; and it is there said by Mr. Justice *Ashurst*, that the plaintiff had not even *a constructive possession*. There, too, *both* parties had become bankrupt; and that is made matter of observation at the conclusion of the judgment delivered, (p. 123.) and is stated as one of the reasons; and the assignees of the factors could certainly have had no right to recover those goods in specie, in an action of trover, after the consignees had expressly refused to accept them.

In support of the argument, that the defendants had such an equitable claim on their goods as prevented any property passing to the plaintiffs as assignees of the bankrupt *Disston*, while they no longer really and beneficially belonged to the bankrupt, the case of *Smith* v. *Pickering* (*a*) was cited, where Lord *Kenyon* held that to be the law on a question, whether, where a bill of exchange which had been delivered to the plaintiff for a valuable consideration, but had been omitted to be indorsed at the time by the drawer, to whose order it was payable, had been indorsed by the drawer after he had, in the mean time, become bankrupt; and his Lordship ruled that it might be so indorsed, saying, that "though "the bankrupts had the legal estate in the bill, yet "it was unattended by any interest, and they were "bound to indorse it." So here, *Disston* had only

(*a*) Peake, N. P. C. 50.

the

1817.

Nicholls and another v. Cobb and another.

the legal estate in the goods consigned, and the order afterwards given by him to deliver them to the defendants, was as much a mere formality as was the indorsement of the bill, in the case cited; and that order was, moreover, by no means necessary, after such a letter, to give a property in the goods to the consignees.

It was then submitted, that although there could be no case found, precisely in point, on the present question, yet that principles might be collected, from the united result of the various decisions on questions arising between principal and factor, and consignor and consignee, which would go to decide this point.

In the case of *Tooke* v. *Hollingworth* (*e*), the converse of the proposition submitted in argument on behalf of the present defendant, was held—that a plaintiff who had sent bills and light gold, specifically to enable a person under acceptances for him to a considerable amount, to meet such acceptances, was entitled to recover them back from that person's assignees, who had taken possession of them under a commission against him, on their arrival, the plaintiff having himself paid the holders of the bills the full amount. And that case is in point to shew, that where goods are sent for a particular purpose, they must be applied to that purpose, notwithstanding the intervention of a bankruptcy in the mean time.

(*e*) 5 T. R. 215.

1817.

Nichols and another v. Clent and another.

In *Walley* v. *Montgomery* (*f*), it was held that a bill of lading and invoice, divested property out of a consignor, by delivery on board a vessel, for every purpose except that of stopping in *transitu*; though in this case there was no bill of lading or invoice in fact, yet there was what may be considered as tantamount in the tenor of the letters written by *Disston* to the defendants on shipping the goods. But the general principle on which this case, and all of a similar description, should be decided, is to be found as laid down most strongly and emphatically by Lord *Mansfield*, in *Alderson* v. *Temple* (*g*), where his Lordship says, "The "most desirable object in all judicial determina- "tions, *especially in mercantile ones*, (which ought "to be determined *on natural justice* and not "*upon the niceties of law*), *is to do substantial jus-* "*tice*: and therefore, I will avoid laying the stress "that might properly be laid upon the assent being "necessary to complete the contract, on *the want* "*of a delivery*; the solid ground of which is, that "a contract shall be presumed complete upon any "distinction, where the justice of the case requires "it, though there is no actual delivery. And it is "settled that if a man sends bills of exchange, or "consigns a cargo, and the person to whom he "sends them has paid the value before, though he "did not know of the sending *of them to the car-* "*rier*, will be sufficient to prevent the assignees "from taking these goods back in case of an in- "tervening act of bankruptcy." Nothing can be

(*f*) 3 East, 585. (*g*) 4 Bur. 2239.

more

1817.

NICHOLS and another v. CARR and another.

more applicable to, or conclusive of, the point in the present case, than such reasoning; which bears most forcibly in favour of these defendants. In another part of the same judgment, his Lordship says, (speaking of what acts a man may do on the eve of his bankruptcy, which, in consequence, gives a preference to a particular creditor)—"It never entered "into the mind of any judge to say, that a man in "contemplation of an act of bankruptcy, could sit "down and dispose of all his effects to the use of "different creditors; but if done in a fair course "of trade, and not fraudulent, it may be sup-"ported." That is precisely this very case; the consignment was in the fair course of trade, and not fraudulent; but on the contrary, for an equivalent consideration benefiting commensurately the bankrupt's estate.

As to the fact of shipping the goods being an incipient delivery, vesting the property in the consignees, the case of *Coxe* v. *Harden* (*h*), establishes that the shipment of goods gives a property to consignees, and if they are not afterwards stopped in *transitu* by the consignors in exercise of their right to do so, the property is completed and irrevocable in the consignees, on the goods coming into their possession.

It has been argued that actual possession of the goods is necessary to the factor's lien, but it was determined in *Drinkwater* v. *Goodwin* (*i*),

(*h*) 14 East, 219. (*i*) 1 Cowp. 255.

1817.

Nicholls and another v. Court and another.

that a factor having sold the goods of his principal, who had, in the interim, become bankrupt, might even afterwards receive the purchase-money from the buyer, by virtue of his original lien, where money is due to the factor from the principal on account of the goods so sold; and in the case cited, the Court held expressly that "a factor has a lien "on the price of goods in the hands of the buyer, "although he had not the actual possession of "them." From the case of *Hammonds* v. *Barclay* (k), also, it appears that where a consignee has paid money, and accepted bills on the credit of a ship and cargo consigned to him for sale, he has a lien upon the proceeds, he having been at one time in possession. In that case, too, the plaintiffs, who were executors of the consignor, were held to be bound by the consignment of the testator—so, here, the assignees are in the situation of the executors, and the death there, was as the bankruptcy here. In all these decisions (it should be observed) the Courts have uniformly adverted in their judgment to the consistency of their determination with the justice of the peculiar case.

In the case of *Lempriere* v. *Pasley* (l), it was expressly determined, after great discussion and time taken by the Court to consider their judgment, that "as between the person who has the equitable lien "(against a bankrupt), and the assignees, if the "lien subsisted before the bankruptcy, they shall

(k) 2 East, 227.

(l) 2 T. R. 490—and *Falkener* v. *Case*, there cited.

"never

1817.

Nanson and another v. Gaster and another.

"never receive or retain the thing without discharging the money due. The party who has the equitable lien," (continues Mr. *J. Ashurst*, following up the distinction), "*ought not to be on a footing with the rest of the creditors*, for whom the assignees are trustees; for the creditors at large trusted to a personal credit; but he who has the lien never gave a personal credit, but trusted to the thing. The money lent to the purchaser would never have become a part of the assets of the bankrupt, had it not been lent upon the credit of the thing pledged; and when the money is taken out of the bankrupt's effects and repaid, they are only just where they would have been if the money had never been advanced. As between the person having the lien and the assignees, they must stand in the place of this bankrupt, and take his property, subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. By the act of bankruptcy they only get the legal right. The bankrupt himself had the legal right before the bankruptcy, but he could never retain the thing against the lien, without paying the money borrowed. So neither can the assignees. Nor if the party obtains the possession, can they get it from him without paying the money advanced." Now that is a clear, solid, and equitable distinction, consistent with justice and equity, furnishing an integral principle on which the decisions in all such cases ought to proceed, so as to reach the right, according to the particular circumstances of each. In that case, the act of bankruptcy had been committed after the assignment of

the

1817.

NICHOLS and another v. CLENT and another.

the goods, and before the indorsement of the bill of lading. The only circumstance in that case distinguishing it from the present is, that the assignment was made as a collateral security for a *debt*, whereas, here, it was to indemnify the party against his acceptances. The reason given at the close of that judgment * for the decision pronounced by it is, that "It might be a great inconvenience "to commerce if it were to be laid down as law, "that a man could never take up money upon the "credit of goods consigned, till they actually "arrived in port." Now, certainly, the inconvenience to commerce would be as great, or greater, in the case of the consignee having accepted the bills of the consignor, which the former afterwards pays.

The last case on this point is that of *Haille v. Smith (m)*. The bill of lading was there held *(n)* to operate as evidence of a change of property, that the change of property ought to be construed with reference to the agreement between the parties (which was, that the consignment should secure them against the large credit given by the consignees, as bankers to the consignors)—and that the doctrine of transfer ought to be expounded very *largely* upon *the agreement* of the parties, and upon *their intent to carry the substance of that agreement into execution*. And said *Eyre*, C. J. "This will lead to the conclusion, that the moment "the goods were put on board the *Hateke*, and

* P. 496.

(m) 1 Bos. & Pul. Rep. 563. (n) Ib. pp. 570, 571.

"the

1817.

NICHOLS and another v. CLENT and another.

"the bill of lading was indorsed and *remitted* to "*Smith* and *Atkinson*, the property was changed, "and was to remain in their hands clothed with "the trusts expressed in the agreement." In the present case the letters were equivalent to the bill of lading in that instance, and the more so, as the bill of lading was not handed to the captain but *remitted* by the shipper to the consignees; and, continued his Lordship, "I shall have no difficulty "in holding that this cargo was vested in *Smiths* "and *Atkinson, notwithstanding the risk remained* "*in those who transferred* the cargo; and not-"withstanding that cargo was to be sold, with a "view to the profit or loss of the consignors.

One of the plaintiff's positions, that this transaction had been originally in fact, what it was described to be in argument,—only an executory agreement—was met by putting the case thus: Admitting that to be so, yet even then, on its completion, all the equities attending it, and all the legal consequences resulting from such completion, would have relation to the time when it had been first made, if nothing had been done in the mean time to vary its terms; and the case cited above (*Haille* v. *Smith*) was reverted to in support of that doctrine.

As to the smaller sum of £. 22. 15*s*., it was insisted that in any event the defendants were entitled to retain that: for if they were right on the other part of the case, that would follow of course. If, on the other hand, the opinion of the court should be against them on the more important points, the

plaintiffs

1867.

Nicholl's and another v. Clent and another.

plaintiffs were precluded, by the form of action adopted: for as they had not brought *trover*, but *assumpsit*, for money had and received, they had therefore acknowledged the sale by the defendants as factors on their behalf, and rendered themselves liable to its consequences; one of which was, that they should pay them their commission, and therefore on that point the defendants must necessarily succeed in their defence.

Richardson, in reply, submitted that the defendants had failed in the attempt to establish, that the delivery to the barge-owner was a delivery to them, or that the letters had made it so in effect. The owner of the trow knew nothing of the defendants, and on his arrival at *Bristol* was bound not to deliver over the cargo till further orders, for *Dinston* had all along complete control over the goods, and they were unquestionably at his disposal, which the bargeman could not have disputed.

It has been attempted to found an argument on the notion, that on the delivery to *Brown* the goods were clothed with a trust—an ambiguous phrase to use in a court of law—but this Court cannot contemplate any such suggestion on a question arising out of an action of *assumpsit* for money had and received.

The case of *Smith* v. *Pickering* was treated as very distinguishable from this, because that was the case of a bill of exchange which had not been endorsed, as it should have been, by an omission, which

was

1817.

Nicholls and another v. Clark and another.

was the effect of mistake or accident; and no doubt the bill having been actually delivered over for a valuable consideration, the property in it passed to the holder, and his possession entitled him to sue on it. The determination in *Tooke* v. *Hollingsworth* affirms a principle which has nothing to do with this case. Among the facts of the cases of *Walley* v. *Montgomery*, and *Cox* v. *Harden*, will be found the prominent one of the goods having been shipped expressly on the account of, and at the risk of, the consignee, and therefore the court held that the property passed on their delivery on board the vessel; and in the latter, the consignee having got possession of the goods, whether right or wrong, it was determined merely that the right of stopping *in transitu* was then gone. The dicta of Lord *Mansfield*, in the case of *Alderson* v. *Temple*, were admitted to be incontrovertible as applied to the facts of that particular case, where the bills of exchange had been put into a letter indorsed *bonâ fide*, and without fraud, and sent to the persons to whom the bankrupts were indebted in a much larger amount; and had the goods in the present case been sent, accompanied with a bill of lading duly indorsed, with directions to the captain to deliver them accordingly at *Bristol*, it would have then been a case approaching more nearly to that of *Alderson* v. *Temple*; but it is the want of those requisites which marks the broad distinction between the cases. In *Drinkwater* v. *Goodwin* the point decided was merely, that a factor who has sold the goods of his principal has a lien for his commission on the proceeds, because he is entitled to receive

the

1817.

Nicholls and another v. Clent and another.

the purchase-money from the buyer. In *Hammonds* v. *Barclay* the executors affirmed the contract after the death of the testator. The same distinction that had been taken in observing on the case of *Alderson* v. *Temple*, it was contended, rendered the determination in *Lempriere* v. *Pasley*, totally inapplicable to the present case.—That was an assignment of goods then at sea for securing a debt, and a bill of lading was subsequently indorsed to the assignee; although in that case an indorsement of the bill of lading was not actually necessary to give effect to the assignment, and the more particularly as the bankrupt had also, as a further security, deposited the policy of insurance with the defendant. In the case of *Haille* v. *Smith* there was a special agreement between the parties, and the Court thought themselves bound to give effect to it.

It was finally insisted that the cases of *Wilson* v. *Balfour*, and *Kinlock* v. *Craig*, already cited, were conclusively decisive of the present, in all points: and as to the distinction attempted to be made, that the bankrupts had, in the case of *Kinlock* v. *Craig*, refused to accept the goods, the answer to that was, that the judgment did not proceed on that ground, or even notice the fact, but was wholly grounded on the principle of want of actual possession destroying the factor's lien. That the defendants never had possession here, even constructively, is quite clear, even from these letters, which have been so much relied on. It does not appear from them that the bills were accepted in consideration of a consignment of the specific goods sent;

1817.

NICHOLS and another v. CLENT and another.

sent; and the second letter expressly reserves a controul over the flour till the bankrupt's arrival in *Bristol*. Whatever hardship therefore there may be on the defendants, the principle of law, established as it is by the authority of all the cases, is peremptory, and cannot be broken in upon in their favour from any such consideration.

On the latter point it was submitted, that as the defendants had sold the flour without any authority from the plaintiffs, they could not claim to retain the commission charged by them for doing that which they had no right to do, and had done at their peril; and therefore on both questions the plaintiffs would be entitled to keep their verdict.

Cur. adv. vult.

7th February.

GRAHAM, *Baron*, now delivered the judgmen of the Court.

[Having stated the circumstances of the case and the question before the Court,] The plaintiffs (said his Lordship) rely on the case of *Kinlock* v. *Craig*; and certainly though the law is quite clear that when a factor obtains possession of goods consigned to him, he has a lien for his general balance, yet it is as clear that he must obtain actual possession of the goods, for that is essentially necessary and indispensable.

The defendant's counsel has argued most ably and ingeniously: 1st, That this being an equitable action

1817.

NICHOLS and another v. CLENT and another.

action in form and effect, is subject to the conflicting equities of other parties against whom it is attempted to be supported; but that proposition, specious as it is, we think far from being true, and we must consider this case as if the action were trover or trespass, in form, and brought for the recovery of the subject matter in specie, or for damages. The difficulty of maintaining that the delivery of the goods on board the trow, was an actual delivery to the defendants, was felt, and therefore that was given up. From all the cases of delivery of goods to be carried to a consignee at a distance, it appears that where such a delivery has been considered any thing like a delivery to the consignee, it has been invariably at his proper risk, and under a formal consignment by indorsement of bills of lading.

Then it is put with equal ingenuity, but with equal fallacy, that this delivery to *Brown* must, under the circumstances of the present case, be considered as clothed with a trust for the benefit of the defendants, so as to give them an interest which the subsequent bankruptcy of the consignor could not divest; that *Brown* was therefore made a mere trustee for the defendants by the effect of the letters, and that the subsequent order given to him by *Disston*, on the arrival of the trow at *Bristol*, to deliver the goods to them, was a mere form, both superfluous and unnecessary. If, however, the property in these goods were completely transferred before, without that order, it would have given a transfer at law as well as in equity; but we think that

1817.

NICHOLS and another v. CLENT and another.

that that last act was necessary in this case to give the consignee his lien, because without it he could not have had actual possession. The delivery at *Bristol*, therefore, was not merely formal, but of the essence of the transaction.

The principal case in point of applicability that has been cited on the part of the defendants, is *Smith* v. *Pickering*; and high as the character of the learned judge who decided that case stands in the profession, it was still a determination at *Nisi Prius*, and it is in fact very distinguishable by the circumstance of its being a question as to the mere endorsement of a bill of exchange; and I have no difficulty in supposing that Lord *Kenyon* said, that if the holder had brought an action on the bill the court would have allowed him to use the bankrupt's name; and nothing is more common than for courts of equity to compel the obligee of a bond that has been assigned by him for a valuable consideration to lend his name to the assignee to enable him to sue on it. The omission of the endorsement was a mere formal error, and by permitting it to be corrected, or the bankrupt's name to be used, a circuity of proceeding would have been at once avoided. That case, therefore, does not stand much in the plaintiff's way.

A great many other cases were cited for the defendant, and the dicta of Lord *Mansfield*, in *Alderson* v. *Temple*, was strongly relied on and much pressed; but the whole of the learned judge's doctrine in that case must be taken with reference

1817.

Meinertz and another v. Grant and another.

to his decision, under the circumstances, which were very peculiar; and his lordship's attention is directed wholly to the consideration of fraud or no fraud. In fact the court did not arrive at a conclusion as to whether there had been a delivery or not of the note in that case; because they held that it was a fraudulent preference.—(His lordship having examined the grounds of the decision in that case, observed, that after all, the question there turned principally on the want of assent; the absence of any accustomed dealings between the parties in the way of trade; the preference in contemplation of the bankruptcy, and fraud; and that Lord *Mansfield* was manifestly getting rid, by what he said of the minor objections founded on the defendant's mere want of knowledge, that the decision might rest on a broader basis, as was clear by the reference to the case in *Strange*, where it was held, that, as the goods had been delivered to the defendants for a valuable consideration, an actual assent was not necessary, but would be intended where there was not an express dissent.)

A mere consignment of goods is not sufficient to give the consignee a lien, without other circumstances. And certainly the case of *Kinloch* v. *Craig* is a most material one on the part of the plaintiffs, and is in all its points exceedingly strong in their favour. In that case, it is true, the bills of lading were not endorsed, but it was proved to be common and frequent in their course of trade not to send bills of lading, or to send them unindorsed; but the whole of the judgment proceeds

1817.

Nicholls and another v. Clent and another.

on the fact of the plaintiff's never having had possession of the cargo, and it was distinctly decided that no property was vested in the plaintiffs by operation of the *executory* agreement, that those consignments should be made to them on the faith of their acceptances. The circumstance of *Sandeman* and *Graham* having declined to receive the goods, from motives of delicacy, does not distinguish that case from the present, because that fact is not adverted to in the judgment delivered by Mr. J. *Ashurst*. Applying that case, as well as that of *Lempriere* v. *Pasley*, and the cases there cited, by Mr. J. *Ashurst*, from the Courts of Equity, to the present, on the ground of the equitable view of it, they are decisive, for *à multo fortiori*, ought the court to have done in those cases what it is contended they should do in this. There is a marked distinction between this case and that of a person having an equitable title, seeking to get in the legal estate. The conveyance in that case is undoubtedly matter of form; but the present case is wholly different from such a one. The defendants had no title to any specific shipment; their claim was general, and how could the letters give them an equitable right to the goods in the trow, or have entitled them to demand a delivery of them; and up to the last moment they had nothing more efficient than those letters; no bill of lading—no invoice. On the other hand, the bankrupt in fact acts as owner by the very order which he gave the defendants at *Bristol*.

The minor question is altogether as clear the other way. The assignees have ratified all that

1817.

NICHOLS and another v. CLEAVE and another.

the defendants have done; and otherwise, indeed, they could have no title to receive the proceeds of the sale; and they must receive them, subject to the defendant's claim for commission. The plaintiffs, therefore, must keep their verdict for the price of the goods sold, minus the charge made for the sale by the defendants.

Postea to the Plaintiffs.

1817.

Saturday, 8th February.

PALFREY v. BAKER.

If a tenant on whom his landlord have distrained for rent, give a promissory note for the amount jointly with another person to release his goods, and a subsequent distress be made on him for arrears of rent accruing due after the period to which the note referred, the produce of the sale of such latter distress must be applied in discharge of the note, and then the person who joined in giving the note for the former rent.

IN the present case the plaintiff had sued the defendant on a promissory note, given by him to the plaintiff jointly with one *Bidgood*. It appeared on the trial of the cause at the *Devon* Spring Assizes, before Mr. J. *Parke*, that the defendant had joined *Bidgood* in the note, which was dated 23d *April* 1814, on occasion of the plaintiff having distrained on *Bidgood* for rent then due to him, and costs of distress, in order to prevent a sale. In *August* 1815 the plaintiff distrained again (*Bidgood* still continuing his tenant), when the goods were sold. The amount of the sale was more than sufficient to satisfy the balance due on the note, part of which had been paid in the meantime, but not sufficient to pay the subsequent rent also.

also. The jury, under direction of the judge, found a verdict for the defendant.

1817.

PALMER v. BARR.

Gaselee having obtained a rule for setting aside that verdict, and for a new trial,

Pell, Serjeant, and *Gifford*, now shewed cause:—They contended that the plaintiff had no right to hold the defendant to a continuing responsibility on the note, but was bound to apply the money levied by the subsequent distress in discharge of the rent for which the note had been given; that the note had not discharged the rent first due, or taken away the plaintiff's right to distrain again for the same rent, but remained a mere collateral security; and the plaintiff having in the end recovered from his tenant by the second distress, the amount of the rent due when the note was given, could not apply it to the payment of the rent accruing due afterwards, and then sue the defendant on the note, and while the note was unpaid the plaintiff's remedy by distress remained, and he was obliged, if he distrained, to apply the produce to its discharge.

Lens, Serjeant, and *Gaselee*, on the other hand, submitted, that the plaintiff might use his higher remedy for the rent subsequently due, and resort to the security for the former rent. The plaintiff distrained for rent due afterwards, and in case of a replevin, he must have confined his avowry to that period. He might elect to apply the produce of the sale under the second distress to the rent for which in fact he distrained, and might have

1817.

PALFREY v. BAKER.

resorted to the defendant for the former rent, by suing on the note which he accepted in discharge of the first distress, because he trusted to his security for the rent then due; or he might not have suffered *Bidgood* to have continued his tenant longer, or have chosen to have given him credit for more rent than the amount of the value of his stock on the premises.

GRAHAM, *Baron*.—The goods taken under the first distress, never having been sold, they were merely a pledge in the custody of the law, and might have been redeemed at any time on payment of the rent. Instead of proceeding to a sale, as he might have done, the plaintiff agreed, *pro hac vice*, to take the defendant's note, and whilst that note was unpaid, his remedy by distress remained, the note being merely a collateral security.

The plaintiff made a second distress the next year, and under that he receives more than enough to pay the rent for which the note was given. It has been said, he must have avowed for the rent subsequently due; he has not done so, however. He received the rent from the tenant by resorting to his highest remedy, and having so received it, he discharged his tenant, as far as the amount proved to be, and so far also his collateral security. Therefore, the verdict is right.

WOOD, *Baron*.—Of the same opinion. The note did not, till paid, discharge the rent, or destroy the landlord's higher security. The original rent

1817.

PALFREY v. BAKER.

rent had never been in fact levied by the distress, for the goods distrained were not sold; the note was given to prevent the sale; the produce, therefore, of the second distress must be applied, as far as it would go, in discharge of the note, or rather of the debt for which the note was given. It was an ungracious attempt, on the part of the landlord; no objection was made to the money being applied in discharge of the old rent, and therefore an assent to it must be inferred.

RICHARDS, *Baron*, concurred.—The note was given, in point of fact, as a collateral security, and by the tenant himself. The landlord's right of distress, therefore, was not affected by it, nor would it if it had been a bond.

Rule discharged.

1817.

Tuesday, 11th February.

JERRITT *v.* WEARE and others.

A lease by a stranger, and entry by the lessee, is not a disseisin in fact, without an entry by force, or an avowed intention to disseize.

THIS was an action of covenant tried at the summer assizes 1813, at *Gloucester*, before Mr. Justice *Bayley*.

The action was brought on the covenants in an indenture of release, grounded on a lease for a year, bearing date 2d *September* 1799, and made between *Edward Harford*, *Abraham Ludlow*, *William Battersby* and *Joseph Harford*, all since deceased, the said *John Fisher Weare* and *John*

1817.

JERRITT v. WEARE and others.

Scandrett Harford, one *Thomas Walker*, also deceased, and the said *Charles Joseph Harford* and *Samuel Lloyd Harford*, of the one part; and the plaintiff, and one *Moses Daniel*, of the other part: By which the parties of the first part, in consideration of 2,000 *l.* granted, bargained, sold, released, and confirmed to the plaintiff and *Moses Daniel*, their heirs and assigns, all those several messuages, tenements, cottages, and buildings, some time then since used as copper and spelter works; and all gardens, yards, outlets, and apartments thereto belonging; and also the several closes, pieces or parcels of ground thereto also belonging, respectively, of and belonging to the grantors, situate at *Conham*, in the county of *Gloucester*, called their *Conham* Estates and Works, containing in the whole 37 A. 4 R. 5 P. or thereabouts, and particularly set forth in a plan made thereof; and of estates and works belonging to the said grantors, called their Cupola Works or Estates, in the year 1776, but which works and estates, called their Cupola Works and Estates, or any part thereof, was or were not meant to be comprized in or pass under said conveyance; which plan was contained in the book of maps of the several estates of the said grantors, and a true copy of which said plan, and of the table of contents thereof, so far as related to the premises thereby granted, was annexed to the said indenture; which said table of contents contained 24 numbers of particulars; to hold to plaintiff and *Moses Daniel* and their heirs, to the uses for the benefit of the plaintiff, his heirs, appointees and assigns; to be holden of the chief lord or lords of the

1817.

JARRATT v. WRANE and others.

the fee or fees of the same premises, by and under the rents and services therefore due and of right accustomed; and also to a certain annual sum of 10*l.* for the support of a meeting-house therein mentioned. And defendants and the deceased grantors covenanted with the plaintiff, that they, immediately before and at the time of the sealing and delivery of the said indenture, were lawfully and rightfully seised of, interested in, or entitled unto all said hereditaments, of a good, sure, perfect and indefeasible estate of inheritance in fee simple, without any manner of condition, trust, limitation, use or uses, estate or estates tail, contingent remainder or remainders, or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber, or determine the same, except only as aforesaid: And also, that defendants and said deceased grantors, immediately before and at the time of the sealing and delivery of the same indenture, had in themselves, or some or one of them had in themselves or himself, and in their, some or one of their own rights or right, full power, good right, and lawful and absolute authority to grant, bargain, sell, alien, release, and convey all said hereditaments unto the plaintiff and *Moses Daniel*, and their heirs, to the uses and upon the trusts in the said indenture of release expressed.

The plaintiff by his declaration assigned a breach of each of the said covenants as to the premises generally, without any specification as to part.

There

1807.

JERRETT v. WEANE and others.

There are also other covenants in said conveyance, *viz.* covenants for quiet enjoyments, free from incumbrances, and for further assurances, which are restrained and limited to the acts and deeds of the grantors, and all persons lawfully claiming or to claim by, from, or under them.

The defendants pleaded that they and the other grantors, immediately before and at the time of the sealing and delivery of the said indenture, were lawfully and rightfully seized of, interested in or entitled unto all said premises; and also, that defendants, &c. immediately before and at the time of the sealing and delivery of the said indenture, had in themselves, or some or one of them, and in their, some or one of their own rights or right, full power, good right, and lawful and absolute authority to grant, &c. Upon the above two pleas issues were joined.

There were two other pleas, introducing the qualified covenants of the defendants, to which the following facts not being so pointedly applicable as to the issues already stated, they are not set out here.

Upon the opening of the case at the trial, it was agreed, that the damages should be assessed by an arbitration if the plaintiff should obtain a verdict upon either of the issues.

On the part of the plaintiff it was proved, that in 1790 or 1791, and for five or six years afterwards,

1817.

JERRETT v. WEARE and others.

wards, one *John James* worked a small quarry of stone on part of the lands in question, being the very outskirt of the defendants premises, called their *Conham* estates and works, and bordering upon the waste of the manor of *Barton Regis*, as to which the breaches of covenant were assigned, and being part of the lands leased to *Bell*, as hereinafter mentioned, under the authority and by the licence of Mrs. *Chester*, the lady of the manor, and the successive owners of the manor; and paid an annual acknowledgment of two guineas to Mrs. *Chester*, and her successors, for working the said quarry; part of the land in question was covered with low brushwood, and part with the cinders and ashes from the defendants' works. By indenture, dated the 1st day of *August* 1792, Mrs. *Chester* demised part of the lands, being then a parcel of waste ground, and described as three-quarters of an acre, with the abuttals and boundaries, (and on which a lettage was afterwards built by the lessee,) to *William Tyler*, for ninety-nine years, if three persons or the survivor should so long live, at the yearly rent of 2*s.* 6*d.* And by another indenture, dated the 4th day of *July* 1792, Mrs. *Chester* demised other part of the premises, being a cottage or tenement, and garden, and small plot of ground, containing four lugs (with the exception of the mines and quarries, and liberty to work the same,) to one *Bell*, for a term of ninety-nine years, if three persons or the survivor should so long live, at the yearly rent of 2*s.* 6*d.* Mrs. *Chester* departed this life in the year 1797, leaving *Thomas Musters*, esq.

heir

1817.

JERRITT v. WEARE and others.

heir at law; and the lessees respectively entered on the premises demised to them respectively, immediately after the date of the leases to them respectively, and continued in the exclusive possession thereof down to the time of this trial; and the reserved rents on the leases have been regularly paid by the lessees, and those who claimed under them, to Mrs. *Chester*, during her life, and after her death to the said *Thomas Masters*.

On the part of the defendants it was proved, that they were partners in *Bristol* in carrying on the copper and brass trades upon an extensive scale; that the premises which they sold and conveyed to the plaintiff were one set of their works, called their *Conham* works, consisting of all the particulars set forth in the plan annexed to the conveyance to him, and the table of contents at foot thereof, *viz.* large copper and brass works, and various yards and extensive lands round the works, which had been damaged by the smoke thereof, a manager's house, and various cottages and gardens for their workmen, including the cottages and land in question, in the whole 37 acres 2 roods and 5 perches.

That coal in the neighbourhood growing scarce, they, in 1792, shut up those works and opened others in *Wales*, and their manager and principal workmen were removed into *Wales*, and those works were abandoned and left unprotected, open and void, and fell into a ruinous state, and lay in

that state till 2d *September* 1799, when they sold them to plaintiff, and made the conveyance to him as stated in the declaration.

That as they had another large set of works adjoining, called the Cupola works, which were stopped at the same time, to avoid any mistake as to the particulars sold to plaintiff, those sold to him were all set forth in the plan annexed to the conveyance, which in the deed is declared to be a copy of their plan of those works made in 1776, and contained in the book of maps of their several estates.

That from the date of their conveyance to plaintiff, *viz.* 2d *September* 1799, no complaint was made to them by plaintiff, or any one for him, that he had not obtained possession of all the premisses conveyed to him; on the contrary, he sold the whole to one *Lukin*; and in 1806, he repurchased them of him; and in 1808, nine years after the sale and conveyance to him, he, for the first time, by letter dated 26th *October* 1808, from his solicitors to defendant's solicitors, made complaint that he had not obtained possession of the parts now in question, being part of No. 23 and No. 24, as marked upon the plans.

The defendants then put in and read a deed of feoffment, dated 27th *Nov.* 1654, whereby *Thomas Chester*, esq., the then lord of the manor of *Barton Regis*, sold and conveyed to *Michael Dayas*, in fee, a messuage, tenement, orchard, garden, and thirty acres of land, with a coppice belonging, called

1817.

JERRITT v. WEARE and others.

called the *Outwoods*, alias *Conham*, situate in the hundred of *Barton Regis*, in the county of *Gloucester*; with all waste grounds, woods, and woody grounds to the same belonging, under the yearly rent of 5*s.*; and that copper and brass works were erected on the premises in the last deed: various other deeds were put in and read, deducing the title in the last-mentioned deed to defendants and their partners, who sold and conveyed them to plaintiff. It was also proved that the parcels in question, viz. No. 23 and 24, No. 23, consisting of 2A. 3R. 10P.; and No. 24 being a house and orchard, comprising 1R. 4P. in the conveyance from defendants to plaintiff, were parts of said premises, in the conveyance from said *Thomas Chester*, subject to the said yearly rent of 5*s.*

That said Mrs. *Chester*, who succeeded to the estates of the *Chester* family, actually received said rent of 5*s.* of defendants, before and at the time she granted said leases to said *Bell* and *Tyley*; and she continued to receive the same of them from the time of granting those leases up to her death in 1797; and that Mr. *Masters*, who succeeded her in the estates of the *Chester* family, continued to receive said yearly rent of 5*s.* of defendants up to the date of their conveyance to plaintiff, viz. 2d *Sept.* 1799.

That the premises No. 24, were occupied by the workmen of defendants, and their families, free of rent; and that No. 23 was the place where the ashes of the works were deposited, and was always

called

1817.

JERMIT v. WEARE and others.

called the *Ashbank*, belonging to the said works; and that the ashes of the works were upon it at the date of the conveyance from defendants to plaintiff.

That defendants regularly cut the brushwood and fern upon these parcels, and used the same at their works as often as the same were fit to cut, up to the time they shut up their said works, as before stated.

Upon the above evidence the learned judge, notwithstanding it was objected on behalf of the plaintiff, that prior to the conveyance to him by the defendants, they were disseised of the cottages and land in question, by Mrs. *Chester* and her lessees, and consequently could not support their issues, directed the jury to find a verdict for the defendant; stating his opinion to be, that there was a wrongful dispossession only, and not a disseisin.

The jury found a verdict for the defendants.

In the ensuing term an application was made to this Court to set aside the above verdict, and have a verdict entered for the plaintiff; and on such rule coming on to be argued, the Court desired the above facts to be stated in a special case for their opinion.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover? If he were, the present verdict was to be set aside, and a verdict to be entered for the plaintiff; if not, the verdict to stand.

Preston,

1817.
8th November
1816.

JERRITT
v.
WEARE
and others.

Preston, for the plaintiff, contended, that the leases of Mrs. *Chester*, and the entry of the lessees, and payment by them of rent, amounted to an actual disseisin, and the consequence, he contended, would be, that the defendants had no right to convey the cottages and land so leased and entered on, and therefore could not support their issue. If the defendants were in fact so disseized, he insisted, they must have regained their seizin to enable them to grant to a stranger; that not having done so, they had only a mere right, and a right of entry is not transferrable. That proposition is clearly laid down in *Shep.* Touchstone, p. 139. Co. Litt. 214. b. and *Lampet's* case *(d)*. He insisted that the defendants could not have obtained possession against the cottagers, whose title was adverse without entry; and that that right of entry was not transferrable. Before the authorities were adverted to, it would be proper, he submitted, to consider the case on general principles. Every person in possession must be so by estate or by sufferance; and where two persons are in possession, one with and one without title, the law treats the estate as in him who has the right. Disseisin, and a consequent possession without right, is the lowest interest a man can have, but it is one which is often the foundation of a fine. An entry, generally, on any possession, is a disseisin, and every adverse entry on the possession of a freeholder, and an ouster is a disseisin. There cannot be a dispossession of a freeholder as contra-distinguished from disseisin, other-

(d) 10 Co. 48 b.

wise,

wise a trespasser could never gain a title. The case of an entry on a tenant for life or years, in possession, for the purpose of claiming his estate, is indeed no disseisin of the fee, because there there is no adverse possession or title against the reversioner; but a general entry would dispossess the termor, and disseize the owners of the inheritance. A disseisin of tenant for life, claiming his estate only, is no disseisin of the reversioner, because it does not divest his (the reversioner's) estate; but if an ejectment had been brought by the defendants against these cottagers after twenty years possession, they could not have recovered, for the cottagers had an adverse possession, and were tenants to their lessor. The real circumstances in this case raise this question: Does a stranger by making a lease acquire a seisin in the freehold? In other words,—Is he a disseisor?

And certainly it does amount to a disseisin, as the entry of the lessee would in law be considered to be by command of the lessor; and there cannot be a tenant in possession, as of a particular estate, without a reversion or remainder expectant on it in some person; nor can a lessor make a lease reserving rent without necessarily claiming title to the reversion whenever the lease shall expire. Every lease supposes and admits a lessor. Whenever a particular estate is created, there must be a reversion, out of which it is derived.

There are conflicting decisions on this question, but the weight of authority is in favour of the pro-

1817.

JERRITT v. WEARE and others.

position, that a stranger, by making a lease, gains the freehold by disseisin against the lawful owner, and drives the disseisee to his assize or entry. There is a distinction between disseisin in fact, and disseisin at election; and it has been attempted to carry disseisin at election to an extent which would destroy all notion of actual disseisin, so well known to the law, and so long established. Disseisin at election is never an actual disseisin. It only serves to give the disseisee a remedy by assize, and never gives the freehold; whereas, an actual disseisin gives an incipient title, under which a sixty years' possession, or a fine and non-claim, would clearly bar the disseisee, and all claiming under him.

And the question now before the court is, Whether what has been done in the present case does amount to such a disseisin as turns the estate into a right of entry? The earliest authority on this point is in the year-book of 12 Edw. III, fo. 12, b. pl. 5. It was in that case held, that a tenant at will, making lease for a term of years in his own name, is a disseisin; the reason is, that by such an act a tenant at will has no longer any interest in the premises; he has determined his tenancy by his own act, and therefore, as a stranger claiming a right, he acquires a freehold by disseisin. *Bro. Abr.* title Disseisin, pl. 67. 58, is to the same purport. A man, by making a lease for years, under which the lessee enters, and the lessor receives rent, makes the lessor a disseisor. *Ib.* pl. 76, 77. and *Rowse's* case *(b)*.

(b) Ow. Rep. p. 28.

But

1817.

JERRITT v. WEARE and others.

But it will be contended that this law is obsolete, and it will be urged, that there are more recent decisions which have since more fully defined a disseisin to be, when one enters intending to usurp the possession, and ousts another of his freehold; and further, that it has been ruled, that it is at the election of him to whom the wrong is done, if he will allow the wrong-doer to be a disseisor, and himself out of possession by disseisin, so that it is at the election of the person put out of possession either to charge the wrong-doer with a disseisin, by bringing an assize, or with a dispossession by bringing any other action. In the case of *Blunden* v. *Baugh (c)*, the first of those wherein the old doctrine has been attempted to be impugned, it is said, that it is established that there must be an obvious intention to oust the freeholder, and that, therefore, *quærendum est a judice quo animo hoc fecerit*; but this observation is clearly applicable to those cases wherein the act is doubtful, and cannot apply to an actual disseisin, as the act of Mrs. *Chester* was. That case has recently been well considered by Lord *Redesdale*, whose opinion is given in the report of the case of *Hovenden* v. Lord *Annesley (d)*. There his lordship recognizes the old doctrine, and adverts to the true distinction, that a disseisin at election is where the possession is gained under a title consistent with that of the occupier having the right, and who was in possession. Thus, a mortgagor paying interest cannot disseize a mortgagee by

(c) Cro. Car. 302. (d) 2 Sch. & Lefr. Rep. 621.

1817.

JERRITT v. WEARE and others.

making a lease, because it may be referred to his equitable interest at the election of the party dispossessed. The case of *Blunden* v. *Baugh*, however, stands alone; and it does not appear that any of the earlier cases which have been adverted to on the present discussion on the part of the plaintiffs were cited or noticed on that occasion; nor was the case of *Shaw* v. *Barber* (*e*), adverted to there, and that case is in direct opposition to *Blunden* v. *Baugh*; neither is there, on the other hand, any authority given for the doctrine said to be held in *Blunden* v. *Baugh*. All the decisions are entirely the other way. That case is indeed recognized by Lord *Mansfield* in *Taylor* v. *Horde* (*f*); but the principle on which the doctrine of Lord *Mansfield* is founded will not bear investigation. It is, that there must be an intention to oust the freeholder to effect a disseisin; but it is clear that the intention of a party cannot controul the legal consequences of his acts, and if an act amount in law to a disseisin, it will not be permitted to the wrong-doer to say, that no disseisin was intended by him. If, indeed, it were in the election of the person disseized to choose in all cases whether he would have been disseized or not, there would be no longer in law any such thing as disseisin; nor any bar, by the operation of non-claim on fines; or by the statutes of limitation, for those statutes never operate by way of bar, unless there has been an actual disseisin. Then the sole

(*e*) Cro. Eliz. 830. (*f*) 1 Burr. 112.

question

1817.

JERRITT v. WEARE and others.

question is, whether there was in this case a disseisin in fact, for if there were, the plaintiffs had no title to convey without a previous re-entry.

As to the fact stated in the case, of part of the demised premises being in the possession of the defendants, who used it as a cinder-bank, it would be absurd to contend that the throwing the cinders of the works on other land kept the possession of the cottages and lands in question. That the lessees were in the occupation of the cottages and gardens and land, is a sufficient answer to that part of the case. To state that fact, is at once to answer it, for possession of other land not within the limits of the cottages and gardens, fully, completely and exclusively occupied, could not be a continuance of the possession, or of seisin of those cottages and gardens.

Puller, for the defendants, (having observed that the question had been much narrowed by the confined terms of the issue in this action of covenant, which reduced it to the inquiry of, whether the defendants were seised at the time of the conveyance to the plaintiffs,) submitted that the leases by Mrs. *Chester* were, at the utmost, a dispossession, and could not be construed to amount to a disseisin, according to the definition of that act in *Co. Lit.* 153 b.: nor could they operate to divest the right of the grantors, so as to invalidate their conveyance of the 2d *September* 1799. It was clear that the leases must have been made under a mistake, and that there could have been no *intention*, on the part of Mrs. *Chester*, to oust the grantors, or acquire

1817.

JERRITT v. WEARE and others.

quire the freehold; and it is not only necessary to a disseisin that there should be an entry, but an ouster also, *(Co. Lit.* s. 279, p. 181 a.*)* Now Mrs. *Chester* was receiving, not only the rent of 2*s.* 6*d.* from her lessee, but also a rent of 5*s.* from these defendants; so that if there was an entry by her, there was no ouster, and consequently no disseisin. In an anonymous case in *Salkeld (g)*, it was laid down by *Holt* C. J. that a bare entry on another, without actual expulsion, would not work a disseisin. The leases were, in fact, rather in the nature of an intrusion, which is distinguished by *Bracton (h)* from disseisin, as being merely a wrongful possession, "*possessio nuda sine aliquo vestimento.*" The same distinction was taken in the case of *Matheson* v. *Trot (i)*, where it was held that a lease, and entry under it, was not a disseisin by the lessor.

This sort of dispossession might have been either by right or by wrong. There is no doubt that, if the cottagers had got in under a grant from another person, ejectment might have been maintained. After all, it was merely a chattel which Mrs. *Chester* had granted, and that could not operate to disseize the defendants to whom Mrs. *Chester*'s ancestors had granted in fee, receiving from them a fee farm rent of 5*s.*, and which was afterwards received by Mrs. *Chester* herself, and for premises of which the

(*g*) Vol. I. p. 246.
(*h*) Ch. 2; and vide *Taylor* v *Horde*, Bur. 109.
(*i*) 1 Leon. 209.

demised

demised lands formed part. In the case of *Goodright* v. *Forrester (k)*, it was contended in argument that no actual disseisin could be committed by a person making a lease for years, who had not previously entered for the purpose of gaining the freehold; and that no person could, by mere receipt of rent, be an actual disseisor; and for that was cited *Blunden* v. *Baugh*, *Pousely* v. *Blackman*, and all that class of cases *(l)*. And there is much good sense in that doctrine. Nor is it any alteration of the old law, but the result of a better understanding of that law, which has obtained of late years, establishing that no one can be said to disseize who does not claim the freehold, and enter for that purpose, ousting the rightful owner. Now here there was neither a claim of the freehold by Mrs. *Chester*, nor did she enter in fact, or oust the defendants; nor could she have been aware that, by granting the leases, she was disseizing the prior grantees of the freehold, much less could she have intended to do so. It is said, that Mrs. *Chester* cannot be permitted now to say, that her leases were not a disseisin. In fact, she does not say so; but these defendants, who have nothing to do with Mrs. *Chester*'s grant, say so in support of their own title; and it appears by the case, that at the time when they granted to the plaintiff, they had all the possession which they could have. But if Mrs. *Chester* herself should disclaim any intention

(k) 1 Taunt. 559.

(l) Palm. 201. Cro. Jac. 659. and 2 Roll. Rep. 284.

1817.

JERRITT v. WEARE and others.

of committing a disseisin, as she has done, by continuing to receive the fee farm rent, there seems to be no reason why that should not destroy the effect of her acts; for if she never intended any such thing, nor made that intention notorious, the making the leases and receiving the rents and profits, would not amount to a disseisin. That was so held, in the case of *William, lessee of Hughes and another*, v. *Thomas (m)*, where it was established that the rents and profits must be received with intentions adverse to the party entitled, and by one claiming to put himself in his place.

It was then urged that in point of fact, the defendants had had possession constantly, notwithstanding the leases, for they had always used the premises as the place where they threw the cinders and ashes from their works, and it was actually in their occupation as an ash-bank at the time that the lease in question was made; and that completely negatives the notion of an ouster by Mrs. *Chester*, however she might, by leasing to the cottagers, have disturbed the defendant's possession.

On the whole, it was submitted, that there had been no disseisin effected by the leases of Mrs. *Chester*; and that, however the facts stated might have operated to afford to the defendants the remedy of disseisin at election, they did not therefore destroy or disturb their actual seisin, which was the sole point put in issue by the pleadings.

(m) 12 East, 141.

Preston,

1817.
4th February.

JERRITT v. WEARE and others.

Preston, in reply, contended that even a dispossession by Mrs. *Chester*, would be sufficient to entitle the plaintiffs to recover in this action of covenant; for the defendants had no right to suffer the possession to be incumbered, therefore it was necessary for them to prove that they were in possession. And they accordingly say that they were possessed, in fact, because they were actually constantly in the occupation of one part of the premises leased, inasmuch as it was used by them as an ash-bank:—But that could certainly not be considered as a possession against the person who actually occupied the house and garden, and gathered the fruit. The circumstance of their throwing the ashes from the works there, was not even a constructive possession of the cottages and gardens included in the leases, nor were they thrown there *animo clamandi*, but merely as any trespasser might have done.

Then it is said that Mrs. *Chester* did not *mean* to commit a disseisin, and that may be admitted; for she probably considered herself in possession of the premises as lady of the manor, thinking that they were part of the waste; still, however, the lease and possession by her lessees, gave her a seisin adverse to the title of the defendants, and her adverse title began from the leases: she had then an incipient right, which would in time be perfected into a good title. The case of *Blundell* v. *Baugh*, and the other cases of that class, arose entirely out of the question,—Who was to be deemed the disseisor? Whether the lessee or lessor answered that character; and there was no question in that

1817.

JERRITT v. WEARE and others.

Williams v. *Thomas*, he insisted, was not law—that it was in direct opposition to *Goodright* v. *Forrester(p)*, which was decided in the same Court two years before, and subsequently in the Exchequer Chamber; and that those two cases could not stand together. In *Williams* v. *Thomas*, the Court were surprised into that decision, and did not advert to the circumstance, that there could be an intrusion against any person except the crown. In the anonymous case cited from *Salkeld*, Lord *Holt*'s observation applies to mere trespassers, and not to a case like the present; and undoubtedly, where two persons are in possession at the same time, the law considers the possession to be in the person who has the right. On minute attention to the circumstances of the case of *Blundell* v. *Baugh*, that case, so far from conflicting with these general propositions on the subject of disseisin, will rather be found to support and confirm them (vid. p. 304). Those propositions are of great importance to titles, and though taken from the old books are nevertheless law; and if overthrown, would render all those titles unsafe which depend on the long-established doctrine of disseisin and adverse possession, non-claim on fines, statutes of limitations, bar by warranty, &c.

This case, (it was submitted) ought to be decided in the same manner as if the question were raised on an ejectment against the lessees—whether it be practicable, after 20 years peaceable possession in

(p) 1 Taunton, 578.

them,

1817.

JERRITT v. WEARE and others.

them, to oust them by ejectment? And if they have terms of years, Mrs. *Chester* must have the reversion.—In this instance, Mrs. *Chester* was, by her tenants, in possession—an actual *bonâ fide* and substantial possession—and the possession of her tenants was a seisin to her.

Cur. adv. vult.

GRAHAM, *Baron*, now delivered the judgment of the Court, which, his Lordship stated, would be directed to the points which had been raised, as if the present action had been, in fact, an ejectment against the tenants claiming under Mrs. *Chester*'s leases; although the frame of the issue, having been modelled on the covenant, did not necessarily involve all the questions which would have arisen in such an action, but had considerably narrowed the object of enquiry.

[Having stated the case at length, and pointed out the material facts on which either party relied] —The breach, said his Lordship, rests entirely on the effect of the leases by Mrs. *Chester*, and a load of knowledge has been brought forward in support of the position,—that they have necessarily the effect of a breach of the covenant,—which has very extensively burthened the case, and of which it is necessary that the question should be first disencumbered. It does not, however, seem necessary that the Court should, on the present occasion, enter into any controversy of the doctrine of Lord *Mansfield*, in the case of *Taylor* v. *Horde*, *(b)*. That case

(b) 1 Bur. 60.

stands

1817.

JERRIET v. WEARE and others.

stands entirely on its own grounds; and so it must, until it may become necessary to dispute the doctrine there held, in some future case, when any such shall arise as may be in circumstances precisely similar. The principle on which that case was finally argued and decided, rests on a foundation not to be shaken. Whether Lord *Mansfield* went too far in the first case, the ultimate decision being long subsequent to the first argument, when the merits might have been more fully discussed, or not, I need not enquire. The decision, however, rests on principle, but as to whether a feoffment grounded on naked possession gives a fee, or not, it has been since determined, that a feoffment with livery did not operate as a disseisin. In the case of *Doe* v. *Horde* (c), Mr. Justice *Aston*, reasoning on the doctrine of recoveries, held that none could be suffered without the concurrence of the party having the estate for life; and that the deed could only authorize a recovery with the consent of the tenant for life, and tenant in tail. Sir *Robert Atkyns*, however, having contrived to get possession, his levying a fine to make a tenant to the *præcipe*, was held a fraud for want of the concurrence of the jointress; and the estate went to the person entitled under the limitation. The cases would be stretched to an unsustainable latitude, if a tenant by sufferance, or tenant at will, making a lease the mere act, should be construed to amount to a disseisin. A manifest intention to oust must be clearly shewn. When the case in *Palmer*, 201, *Pousley* v. *Blackman*,

(c) Cowp. 689.

was

1817.

JERRITT v. WEARE and others.

was mentioned, the Court was quite astonished. Why is it that the lease of a mortgagor is no disseisin? Because the mortgagee meant that he should keep the possession, and no intention of an ouster could be made apparent in such a case. There must be a manifest intention to oust, as well as an actual ouster; and we must look to see what it was the real intention of the party to do, before we hold the act done to be, in point of fact, a disseisin.

There must be a manifest intention to oust, as well as an actual ouster, to constitute a disseisin in fact.

In this case, the position that the mere circumstance of a lease by a stranger and entry by the lessee, whatever might be in fact the intention of the parties, in point of law, amounts to a disseisin, is the principle on which the whole argument on the part of the plaintiff rests. For that position the authority in *Bro.* Abr. Tit. Disseisin, pl. 76, is relied on. Now that passage literally translated, is to this effect, —*A.* leases land of *I. M.* to me for years, rendering rent, the lessee enters and pays rent to the lessor, the lessor is a disseisor; the reason given is, because he who commands another to enter is a disseisor, which, take notice, is on account of the void lease. That comes to this, the lease, being void, is equivalent to a command to enter, but that refers wholly to the mode of effecting disseisin in those days, when it was often accompanied with force. That *dictum* too, such as it is, is not quoted by *Comyn*; and therefore it was, probably, not then considered law, but if it be, still applying it to the present case, it establishes no more than this—that if Mrs. *Chester* commanded her lessee so to enter, she was a disseisor.

1817.

JERRITT v. WEARE and others.

disseisor. Thus the whole of this elaborate doctrine rests on the most slender grounds; yet mark how this nucleus is rolled up into a mass of argument! Because a little cottage, by a blunder of Mrs. *Chester*, has been leased without right, that is magnified into a disseisin, which is to destroy the title of these defendants who claim under her deed. It would be quite absurd if such a thing should be suffered; and I am really ashamed of the pains I have taken in looking into the old cases which have been cited, to discover if they furnished any such doctrine as would support the argument used for the plaintiffs.

Then let us see what a disseisin in law has been defined to be, and that may readily be shewn by a few passages from the old books.—Lord *Coke* has adopted the definition of *Bracton** and *Fleta* (the Mirror), *(r)*.—"*Disseisina* is a putting out of a "man out of seisin, and ever implieth a wrong; "but dispossessing, or ejectment, is a putting out "of possession, and may be by right or wrong." Then he comes to his illustration, "*Omnis disseisina est transgressio, sed non omnis transgressio*

* *Bracton*, in l. 4, f. 161, 2, has enumerated very many various modes of disseisin, wherein the main distinctions taken between disseisin and trespass appear to be founded on the *criteria* of the nature and character of the acts of the disseisor—as, whether the putting out were *violenter, injuste, et sine judicio*,—and so as to a *keeping* out, if the possession had been vacant, whether it were *animo clamandi*, or *contra voluntatem possidentis*.

(r) Co. Lit. 153. b.

"*est*

1817.

JERRITT v. WEARE and others.

" *est disseisina. Si eo animo fortè ingrediatur* " (now that word *fortè* is extremely important) " *fundum alienum non quod sibi usurpet tenemen-* " *tum vel jura, non facit disseisinam sed trans-* " *gressionem, &c. Quærendum est a judice quo* " *animo hoc fecerit, &c.*" Then adopting the criterion *quærendum est quo animo*, let us see what was the intention of the parties in doing the act which has created the present question; and that it is easy to collect from the circumstances of the case—[His Lordship took a brief review of the facts.]—Then the argument used for the defendants was properly this:—Could Mrs. *Chester* have intended to disseise the plaintiffs, when she and her successors have ever since been receiving the 5*s.* rent from them? She had, in fact, no more idea of committing a disseisin than a robbery. But then it is said, on the other side, that we are not permitted to seek for any such explanation of her acts from her intentions, however obvious, because these acts cannot be so qualified—for that their effect in law is not to be explained away; and that is really the doctrine which the common sense of the Court is called on to adopt. Now nothing could be more absurd in us, than to hold such a doctrine at this time of day; but the old books do not, in fact, afford any pretence for the argument, and the very definitions which I have cited clearly shew it.

Then let us go still further: I will suppose, for a moment, that Mrs. *Chester* was a stranger; and even then I would say, that this act of hers would

1817.

JERRITT v. WEARE and others.

not have operated as a disseisin in the absence of intention. Now Mrs. *Chester* was by no means a stranger, and her acts are not to be construed so rigorously. But if we add to all this the fact of her acknowledging the plaintiff's title, by receiving suit and service, it becomes so clear that she did not mean even to dispossess them, as to leave not a shadow of doubt on the effect of this act.

If, however, Mrs. *Chester* should at any time afterwards have insisted on any claim which the consequences and legal operation of such an act might, under any other circumstances, have given her: an answer to it, is to be found at hand in the doctrine of estoppel. In *Co. Lit.* 352. a. & b. it is said there are three kinds of estoppel: by matter of record—by matter in writing—by matter in *pais*. Two of those three are directly applicable here: there is no matter of record in this case certainly, but there is matter of writing, because Mrs. *Chester* is in privity of feoffor, and she would be concluded by her deed. Then there is also this very case, which might have served to illustrate the effect of matter in *pais*—her continued acceptance of rent from the party against whom she would have to make good her claim.

A previous deed operates by way of estoppel, by matter in writing against a subsequent act of disseisin.

So does acceptance of rent by matter in *pais*.

But let us admit that this act of the lease by Mrs. *Chester* were, in point of law, a tortious ouster by her. In that case it is clear the tenant could claim nothing but his term. Mrs. *Chester* would then be the disseisor, having the reversion

in

in a tortious fee: and her acceptance of rent from the defendants as her tenants, would in such a case have the effect of remitting them to their ancient estate.

Then again—Suppose Mrs. *Chester* to be in the situation of a person making claim, after entry tolled, as heir of a disseisor. There is a passage in the text of *Littleton* (Sect. 692), which clearly shews that she might then have disclaimed, and the tenant might lawfully enter because of the disclaimer. Now that position, as applied to this case, founded on the fact of the acceptance of the freehold rent up to the latest moment, which is an express disclaimer, is an argument against any claim under what has been called this disseisin, which is really past the power of answer.

On the whole, therefore, it appears to me, that the arguments used in favour of these plaintiffs, whose case rests on the slightest possible grounds,—that this lease of Mrs. *Chester* operated as a disseisin,—are totally without foundation: But then, even admitting that, under the circumstances of this case, there had been a disseisin in fact, it is gone, purged, and in all respects waived by the subsequent acts of disclaimer.

I do not charge my brothers with concurring in all that I have said in expressing my sentiments on this case, but I believe I may say that they in effect entertain the same opinion.

1817.

JERRITT v. WEARE and others.

In another point of view, if this were a disseisin, as has been contended, I am of opinion that the defendants would still be entitled to their verdict, for there has not been any breach of this covenant; for there is no defect in point of fact in the general title. What can a man be supposed to covenant against beyond the validity of title? and most assuredly not against these surreptitious pocket leases. It is enough that a man covenant fairly against defects in his title, but he is not to be bound by such ridiculous rigour as these plaintiffs would hold him to. Suppose that Mrs. *Chester* had brought an ejectment, what could she have said to the objection, that she had received rent? Yet is this pretended possession of paper and packthread to be called by the tremendous name of disseisin; and on that the plaintiffs would induce the Court to set aside the judgment obtained by the defendants, and to which they are clearly entitled.

WOOD, *Baron*, concurred.—I will say one word only on the last point: I am quite clear that there has been no breach of covenant in this case. The action of covenant only extends to the consequence of legal acts, and the reason is to be found in the case of *Hayes* v. *Bickerstaff* (*s*), that the law shall never judge that a man covenants against the wrongful acts of strangers.

Postea to the Defendants.

(*s*) Vaughan, 121. And see the cases in Note 10 to *Wotton* v. *Hall*, Saund. 181. a.

CLARKE v. MANSFIELD.

1817.
12th February.

TRESLOVE opposed this motion, made by *Dauncey*, for taking the answer to an injunction-bill off the file, on the objection of an irregularity, (the defendant having signed the first skin only of several which the answer had occupied) praying, that as it was a mere omission, the Court would permit him, if the rule required it, to sign the other skins now, and give him time to come from the country for that purpose.

If a defendant have only signed one (the first) skin of his answer, which is an irregularity, the Court will not order it to be taken off the file, but will permit the defendant to sign the others.

And if he reside in the country, they will give him an opportunity of coming to town for that purpose.

GRAHAM, *Baron*.—This objection should have been made *in limine*.

Dauncey.—Notice of the motion was given on the day of the filing the answer.

GRAHAM, *Baron*.—Such a rule ought to be founded on long practice, and in my time I do not remember that it was ever done. The defendant here clearly meant to do all that was right, and if he has omitted to do enough, he may do it now.

WOOD, *Baron*.—That will be the best way of disposing of it.

Ordered.

The KING, in aid of BUSK and another, v. CRIPPS and others, Assignees of MONTGOMERY and another, Bankrupts.

1817.

12th February.

The Court, on application of claimants, will, by rule to shew cause, order a *vend^i exponas* to issue before the duetimearrive for selling the goods of a bankrupt seized under an extent, on an affidavit that it would benefit the bankrupt's estate, because the price is expected to fall, &c.; the sheriff to pay the prosecutor's demand into the hands of the Deputy Remembrancer, to the credit of the cause, and the remainder to the assignees: the defendants (the claimants) paying into Court 100*l.* beyond the amount of the debt claimed by the prosecutor.

CAUSE was this day shewn by *West* against a rule obtained by *Littledale*, in this case, on behalf of the assignees, on the 5th inst. calling on the prosecutors of this extent to shew cause why a writ of *venditioni exponas* should not issue, directing the sheriff of *Lancaster* to take and dispose of the goods, &c. of the bankrupts, returned by the said sheriff as seized under the inquisition; and why the sheriff should not be ordered to pay into the hands of the Deputy Remembrancer to the credit of this cause, out of the produce of the sale, the amount of the debt claimed by the prosecutors, and to pay the remainder over to the defendants, without prejudice, &c.

The affidavit of the defendants, on which the rule had been obtained, stated, that the goods, chattels, and effects seized, &c. were more than sufficient to satisfy the sum mentioned in the extent to be due, &c. exclusive of the lands, &c. which had been taken, &c.;—that the goods seized were of fluctuating value, and that it would be for the benefit of the bankrupt's estate that some of the merchandise seized, should be immediately sold, because the price of such articles was high at the time of making the application, but was expected to fall on the then expected opening of the navigation of the *Baltic*.

It

1817.

The KING in aid of RUSK and another v. CRIPPS and others.

It was also stated, that some of the property was receiving injury from the dampness of the place in which it was then stowed. Under these circumstances

The Court made the

Rule absolute.

The defendants to pay into Court 100*l.* beyond the amount of the debt claimed.

END OF HILARY TERM.

SITTINGS AFTER HILARY TERM,

57 Geo. III.

GRAY'S-INN HALL.

1817.

1st March.

WARD, Clerk, *v.* SHEPHERD and others.

A defendant in a tithe cause having set up a defence of composition real, cannot afterwards rely on its being in fact a modus.

THE plaintiff, as rector of *Langley (Derby)*, prayed by this bill a general account of tithes.

The defendants pleaded, that *before the reign of Elizabeth* certain closes of land called the *Snapes* (or *Little Snapes*), containing about 32 acres, and a horse-gate or horse-grass, or the privilege of keeping and depasturing a horse throughout the year on another parcel of land in the said parish, called the *Park*, were by the then owners thereof duly conveyed to the then rector, in full satisfaction of all tithes. And the answer also stated, that a former occupier of the piece of land called the *Park*, used in his lifetime to pay to the plaintiff's predecessors the yearly sum of 3*l.* 6*s.* 8*d.* in lieu of, or as a rent or compensation for, the said gate

Such a defence is double, and too uncertain.

[As to the mode in which the defence was laid, and whether it were doubtful if the defence, though approaching more nearly in form to a composition real than a modus, might not be consistent with a statement of modus,—see the terms of the answer as given verbatim, in its several doubtful parts, in the course of the judgment.]

The objection to a composition real being presumed from usage, is founded on the maxim *nullum tempus occurit ecclesiæ.*

or

1817.

WARD v. SHEPHERD and others.

or horse-grass.—The defendants admitted that they had not in their possession, custody, or power, any deed, &c. whereby the said conveyance had been effected, or any extract therefrom, alleging that many ancient documents, &c. which ought to be in the cathedral church of *Litchfield*, had been destroyed in the civil wars; *but that they nevertheless hoped to be able to prove the existence of such a deed.* They then adverted to certain terriers, from some of which they stated it would appear, that the said closes and horse-gate had been accepted by the plaintiff's predecessors in lieu of tithes; and from others, that the defendants lands were exempted from the payment of tithes, and charged non-payment of tithes in kind or *sub modo* from time, &c.

This case had been much argued, and underwent very considerable discussion during several days; but the judgment of the Court is so fully given, and all the grounds and authorities of their decision, as well as the facts, the statements in the pleadings, the defence to the bill, with the proofs, and the objections to the defence, that on a question so often before the Court, it has been thought sufficient for all the purposes of the Report to give the judgment alone.

Dauncey, and *Wetherell*, were of counsel for the plaintiff.

Martin, *Clarke*, and *Dowdeswell*, for the defendants.

Such

1817. 1st March.

WARD v. SHEPHERD and others.

Such of the barons as were now present* delivered their opinions *seriatim*.

WOOD, *Baron*.—The case of *Ward* and *Shepherd* now stands for judgment. And I am sorry to say, that in this, as in most others involving the same point, I am compelled to differ from the rest of the Court; and that arises from my notion of the principle of law on which I judge this sort of case, differing most materially from those formed by the rest of the Court, and on which their judgment proceeds.

The principle on which I go in all these cases is this:—That where for a length of time, as far back as living memory goes, there has been a modus, or an ancient composition paid in lieu of tithes, it is to be presumed that it had a legal origin.—Upon this principle Courts of law proceed, and I myself see no good reason why Courts of equity, when they are deciding on a legal question, should not adopt the same rules: they are rules, I am sure, founded on public convenience, and if adopted and adhered to, would prevent a vast deal of litigation in causes of this description.

Another rule is this: that where it appears upon the whole of an answer, and from the evidence to support that answer, that there is a good defence;

* The Chief Baron was absent, from ill health, and Mr. Baron *Richards* had proceeded on the circuit. It appears, however, from what fell from Mr. Baron *Graham* in delivering his judgment, that they concurred with him.

although

although the answer may not be drawn so precisely and formally, or technically, as it ought to be, that defence ought to prevail: these are the two principles on which I judge this case.

I will now state what it is. The bill was filed by the plaintiff, as rector of the parish of *Langley*, or *Church Langley*, in the county of *Derby*, against four persons, to recover the tithes of a certain district in that parish, called *Meynell Langley*, consisting of about 1,000 acres of land. His title is, that he is rector, and therefore he has nothing more to do than to prove that he is rector. The defendants, by way of defence, deny that he is entitled to tithes in kind, because, they say, "there "has been a composition real, and they doubt not "to prove, that *long before the reign of her Ma-* "*jesty Queen Elizabeth*, a certain close or parcel of "land, now divided into four parts or closes, com- "monly called or known by the name of *Snapes*, "lying within the district or division of the parish "called *Meynell Langley*, and containing by esti- "mation 32 acres, and a horse-gate or horse-grass, "or the privilege of keeping or depasturing a horse "throughout or at all times of the year, in a parcel "of land within the said district or division of the "parish called the *Park*, was given or set out by the "persons who were then seized of those premises, "to the rector, in lieu of tithes; and that the close "and horse were then duly conveyed to the then "rector of the parish, in due form of law; and "that no tithes whatsoever, either great or small, "have since been paid." So that by this first

answer

1817.

WARD v. SHEPHERD and others.

answer they set up a composition made before the reign of Queen Elizabeth.

In the second answer—for the bill is amended for some purpose or other, and there is a second answer put in by the defendant, on the bill having been so amended to interrogate them as to whether they had any composition deed in their custody, or not,—They say, "that they have no such composi-" tion deed in their custody, but that they have been " informed, and believe it to be true, that a great " number of ancient documents, deeds, writings, " and other instruments relating to the possessions " of the churches within the diocese of *Litchfield* " and *Coventry*, were destroyed during the time of " the civil wars, and that many evidences and writ-" ings which ought to be found in that cathedral " have been lost or destroyed;"—and then they go on to state farther, what they had not done in the former answer.—"That it appears from a terrier of " the parish of *Langley*, exhibited in the year 1612, " which appears to have been signed by *Thomas* " *White*, the rector of the parish, and by the " churchwardens of the parish, and divers other " persons, that the close called the *Little Snapes*, " and the horse-gate in the parish, had been ac-" cepted by the predecessors of the said *Thomas* " *White* in lieu and recompense of *Meynell Lang-*" *ley* tithes, and that the same had been continued " time out of mind by way of composition." Now some stress may be laid upon the words "by way " of composition;" but "by way of composition," certainly may mean a modus, for there is no differ-

ence

1817.

WARD v. SHEPHERD and others.

ence that I know of between a composition real, and a modus, except that one is made within the time of legal memory, and that the other is before the time of legal memory; and they may both be called compositions. Then they state, that it appears by that terrier that such composition had been continued time out of mind: and that must mean from time immemorial; for that is the legal sense and meaning of the words time out of mind.

Then they go on to say, that "it appears from "divers other terriers, and particularly by a terrier "exhibited of the year 1701, that the whole of the "lands in *Meynell Langley* were exempted from "the payment of tithes, and, they believe, that no "tithes in kind, arising out of this division, have "ever been paid to, or received by, the complainant "or any of his predecessors, rectors of the parish "of *Church Langley*, from the time whereof the "memory of man is not to the contrary:"—now those are strict legal terms of prescription of custom;—"and that all the lands within the said "district are, and from the time aforesaid, have "been, by prescription *or otherwise*, legally ex-"empted or discharged from the payment of all "manner of tithes:—but although it alleges "or "otherwise," yet it alleges, that "from the time "whereof the memory of man is not to the con-"trary, it has been exempted," and that therefore does not vary it:—"and that the rectors of the same "parish for the time being have, from the time "aforesaid," (that is, from time immemorial,) "held "and enjoyed the said close or closes called the "*Little Snapes*, and the said horse-gate, in lieu

"and

1817.

WARD v. SHEPHERD and others.

"and full satisfaction of all tithes, both great and "small, yearly arising within that district." So that, thus far, it appears most undoubtedly to be a defence founded upon immemoriality. Then there are some words afterwards which may perhaps require to be explained; because, they say, that they have not, owing, as they believe, to the ancient documents, evidences, and writings formerly in the registry of the Cathedral Church of *Litchfield* having been lost or destroyed as aforesaid, been as yet able to find that deed of composition.

Upon this bill and answers, depositions have been taken, and by those depositions this case which is insisted on, on the part of the defendants, has been fully proved. It has been proved that in the year 1612 there was this terrier, which was signed by the rector of that day, and was written three or four years after the reign of Queen *Elizabeth*; and they speak of it as of time out of mind, so that there is no doubt that it existed before that time: and if we carry it back to 40 years, or some distant period, so as to give it an origin before that time, why may we not go as far back as the time of *Richard* I? They have also proved other terriers, which mention the same thing. There is some little variation as to the quantity of the *Snapes*, but that cannot make any difference, because they are defined by name. They have also proved by their evidence that this horse grass is rented by the owner of the park, who pays a sum of money for it. So that a case of an immemorial modus or composition has been clearly made out in evidence, as it is asserted by the answers.

Now,

1817.

WARD v. SHEPHERD and others.

Now, there are two questions arising upon this: First, whether this is a composition real? and on that, I think, there can be no doubt; but, however, it is said that a composition real cannot be proved unless you produce the deed, or give evidence of its existence. With respect to that point, I have already given my opinion very fully in the case of *Bennett* v. *Neale (a)*, and therefore it will be unnecessary to repeat it. I still continue of the same opinion; and insist that on all principles of law and justice a composition deed ought to be presumed from length of usage and enjoyment; but I will not go into that, because it is sufficient to refer to Mr. *Wightwick's* book, where I find my opinion given very fully.

The earliest case is that of *Robinson* v. *Appleton (b)*, which was somebody's manuscript case, (whose I cannot tell,) but it is quite loose, and seems to have arisen without any argument. It has, however, been implicitly followed ever since. But before that time, I find a case in which Lord *Hardwicke* sent a composition real to be tried when there was no evidence of any deed, or any thing like it, as it appears to me. I allude to the case of the Archbishop of *York* v. *Hayter* and *Stapleton*, which is to be found in 2 *Atkins* 136, and 2 *Gwillym* 772. That was a bill filed by the Archbishop of *York* against Dr. *Hayter* and Sir *Miles Stapleton* for an account of tithes, and to establish the custom of setting out the corn in stooks or stacks. Several questions arose in the course of the cause; one of those questions was upon a right of exemption claimed of all the lands that had belonged to the dissolved

(a) Wightw. 324. (b) Gw. 1101.

1817

WARD v. SHEPHERD and others.

dissolved monastery of *St. Mary*, in the neighbourhood of *York*. Then there was another question as to the composition real for *Main Meadow* of about 200 acres, in which it was insisted that five acres, called *Tithe Acres*, were set apart in lieu of tithes for the rest. And as to that an issue was directed, though there appears to have been no deed of composition, or any thing of that sort produced in evidence in that case, to establish that real composition; and yet my Lord *Hardwicke* says,—The first issue must be as to the manner and method of tithing; the second issue, as to the exemption; and he directs a third issue, as to the real composition. Now, there was nothing in that case to establish that composition, but the evidence of usage, and no objection was taken on that ground. At that time of day it never occurred to that great judge, who was a judge both of law and equity, that usage would not be evidence of a real composition. Twenty years after came *Robinson* v. *Appleton*, which has been followed ever since; but I protest against that case altogether. That decision however is not one which we are particularly called on to consider upon this occasion. My position is, that upon this answer, and upon the evidence, a decree ought to be made in favour of the defendant, or that an issue ought to be directed to give him an opportunity of trying this immemorial composition; for I conceive that the second answer has put it on that footing. It was so considered by the counsel in argument, and evidence has been read to it; or otherwise, in reading that evidence, if it does not apply, we have lost a good deal of time, and why should we hear such evidence if it were a case wherein we ought not

1817.

WARD v. SHEPHERD and others.

not to admit it? I however consider that it was right to admit the evidence, and for that purpose.

Now, in order to prove the position which I set out with,—that where it appears, upon the whole of a case, that there is a good defence, that defence ought to prevail, although it may not have been formally and technically put on the record,—I shall refer to some of the cases to be found in the books which warrant me in maintaining that in this case (though there may be something in the first answer which seems to confine the usage within the time of legal memory,) yet if the evidence is fairly set out, and that proves it to be an immemorial composition, an issue ought to go to try whether it is such an immemorial composition or not, if the rector chooses to try it.

Of the authorities I will mention the first, is the case of *Atkyns* v. Lord *Willoughby de Broke (c)*. In that case, it was set up that there was an immemorial payment due and payable by the owners or occupiers of certain lands by way of modus or composition. It was contended by the counsel for the plaintiff that the modus was not set forth with sufficient certainty; for it was pleaded as a modus or composition, whereas the claim of exemption set up, being against common right, must be accurately defined: With respect to the first objection, the Chief Baron says, 'To the modus set up in 'this case, several objections have been taken; first, 'it has been argued, that it is not laid with sufficient

(c) 4 Gw. 1412.

 'certainty

1817.

WARD v. SHEPHERD and others.

'certainty to found a decree, and if this were a bill 'to establish these moduses, that might be the case, 'but in an answer such strictness is not requisite, if 'it appears that there is a good defence, that is sufficient.' So here, I say, it does appear that there is a good defence, and therefore that is sufficient, just as much in this case as it was in the case of *Atkyns* v. Lord *Willoughby de Broke*.

Another case, in which I find the same doctrine, is *Strutt* v. *Baker (d)*. In that case there was a bill filed to establish the rector's right to tithes, and for an account: the defence was a prescription *de non decimando* in a *que* estate, as to two-thirds possession by the lord of the manor, under an apparent title, by various conveyances, &c. stated by the answer, from 37 *Henry* VIII. of the lands, with tithes generally, or two-thirds specifically, with evidence of reputation and notice to the plaintiff, who had purchased the advowson and was lessee of the tithes. So that that was pleaded as an exemption with respect to two-thirds of the tithes. Now it turned out upon the evidence that it was *not* an exemption; that so far from it, it was a proportion of two-thirds of the tithes that the defendant was entitled to; and see what the Court say upon that subject when the objection is taken. The Court states, 'that the defence is very fairly to be collected 'from the answer. The person who drew it, if he 'knew what a plea was, did not mean to put in a 'plea of prescription against the demand of the

(d) 4 Gw. 1430.

'tithes

'tithes. That plea, not only in substance but in 'the manner in which this is expressed, "or by 'other lawful ways or means," would be clearly bad. 'It is quite impossible it could have stood: he could 'not apprehend he was drawing a plea. But the 'answer has very fairly set out all the facts which 'constitute the defence, and put the plaintiffs in 'possession of all the case he is to meet, and it is 'no matter how it is argued in the answer.'

Now apply that to the present case: do not the defendants in this case fairly set out all the facts which constitute the defence? And they give evidence to prove them. They produce the terrier of 1612, reciting this to be an immemorial composition; they state that there are terriers subsequent to that which recognize it also; they state that the horse grass has been occupied by the owner of the land, he paying a rent for it. All that is stated and proved. Then is there not a full and fair defence stated, so that the plaintiff cannot be surprised? The evidence fully establishes the case as stated, and when it is fully proved, what does it matter if it should be incorrectly stated in point of time of commencement? A defendant is not to be confined to time. You state your whole case, and put the plaintiff in possession of that case; how does it signify that it is ascribed to a wrong origin when he might have ascribed it to a better? You must undoubtedly put the plaintiff in possession of all the case he is to meet; but having done so, it is no matter how it is argued in the answer.

But in later days there has been another case, in

1817.

WARD v. SHEPHERD and others.

which I had the honour of giving my opinion, that is the case of *Clarke* v. *Porter (e)*.

That was a bill filed by the vicar of *Great Waltham*, who claimed the small tithes: the defendant, *Porter*, was the occupier of a farm which belonged to the President and Governor of *Guy's Hospital*, in that parish. The defendants claimed to be exempt, on the ground that those lands had belonged to the dissolved priory of *Leighs*. That was the defence set up; but that turned out not to be the precise exemption; for it appeared, that in point of fact those lands had never been parcel of the possessions of *Leighs* priory, but had belonged to *Littley* chapel, a free chapel, given by the statute of *Edw.* VI. to the Crown, from whence the title was derived by the Hospital; and the Solicitor General, who was for the defendant in that case, said, he was ready to admit that the answer was drawn on a mistaken view of the question; but taking the answer to have been drawn on a mistaken view of the question, that they were misled in supposing the lands to have belonged to *Leighs* priory: yet if they should appear to have been exempt as part of a free chapel, why (he asked) is the defendant to be deprived of the benefit of it? as whether it belonged to *Leighs* priory or not was perfectly immaterial, for they had an opportunity of negativing that.

If an exemption be pleaded for lands as having belonged to a dissolved priory, and it is proved they belonged to a free chapel, it will be sufficient.

It was contended, on the other hand, that as the defendants had by their answer put their defence on a title which supposed the tithes to have been parcel of the possessions of the priory of *Leighs*, and which

(e) Hil. T. 48 Geo. 3.

was

1817.

WARD v. SHEPHERD and others.

was fully negatived by the evidence, the Court ought to decree against the defendants. But the Court were of a contrary opinion. They said that they ought to look at the whole case, and see whether the plaintiff's title, as vicar, was made out; and they directed that the plaintiff might have an issue to try his title as vicar, if he pleased; which at first he declined, but afterwards he took an issue and failed on the trial.

Now these, in my mind, are strong authorities to shew that you ought not to look minutely and strictly to these pleadings, but to say whether there is in substance a good defence: and if upon the whole case, as it turns out before the Court, you see that although there be no existing proof of a deed of composition, there is still proof of immemorial non-payment, the party ought to have the benefit of it. Therefore, I am of opinion, that the defendants are entitled to an issue to try whether this is an immemorial composition or not*.

GRAHAM, *Baron.* My learned brother *Wood* has very truly stated, that in this case there is a difference of opinion among the judges; and undoubtedly I do not mean to say that this is not one of those cases which, amongst the several which we have before us, have more than all the rest justified the time which the Court have taken, to make up

* Vide ante, Vol. I. p. 236, *Prevost* v. *Benett*; and the note. & *Bullen* v. *Mitchel*, Vol. II. 399. Et vide *Bennett* v. *Sheffington*, Vol. IV. 143.

1817.

WARD v. SHEPHERD and others.

their minds upon the subject; and I am very free to say, that in the opinion which I have formed upon the present occasion I have come to the conclusion which has determined my decision, with a considerable fluctuation of opinion in the course of my enquiries upon it: but upon the fullest consideration that I can give to the subject, it really does appear to me, that upon the present occasion the defence put upon this record cannot be sustained.

The bill has been stated, and the circumstances. It was filed for the tithes of a very large district of this parish of *Church Langley*, which is divided into two districts; and that is met by a claim of exemption from the payment of tithes by the defendant, as set forth in his answer. Now the short ground of my opinion is this,—that taking the original answer and the answer to the amended bill together, the defendant has substantially, and in strict language, put his defence upon the single ground of a composition real; and I think that, under the circumstances of this case, the Court might run the risk of doing very great injury to the party plaintiff in the present cause, if it were to give that defence any other shape; for that it is which forms the difficulty in this case,—whether the Court is to step in to aid the defendant upon the present occasion or not. Now I state, that, substantially, it appears to me, on reading these two answers, that the defendant rests—(and he probably had very fair ground to rest upon it from the persuasion, founded on the tradition in the parish)—upon an exemption under a composition within time of memory. It is impossible to construe

it

1817.

WARD v. SHEPHERD and others.

it otherwise, and I will not take up the time of the Court in canvasing the language of the answer. My learned brother *Wood* admits that in the first answer the defence is put on the ground of a composition real. No man can read it, and particularly that part where he says, that "long before the time of *Elizabeth*, &c." without seeing that he speaks with a marked distinction between the period within the time of memory and the period antecedent; and when he talks of long before the time of queen *Elizabeth*, he means antecedent to the date of the 13th of *Elizabeth*: his allusion to that period marks his clear intention to stand on that ground. Then the defendant says that he is informed, and he verily believes, that at a period within time of memory a composition did take place;—that in consideration of a certain portion of land, at that time of day consisting of 16A. or thereabouts, and a horse-gate, the proprietors of lands in *Meynell Langley* were exempted from the payment of tithes,—thus calling it a composition in terms. This is the nature of his original defence; and notwithstanding the words of the terrier, which he rests on in his answer, he does not affect to misunderstand the expression of time out of mind as applicable to a time antecedent to the reign of *Richard* I.: he considered that terrier, when he says that it has been continued by composition time out of mind, as referring to a period only that would overreach the 13th *Elizabeth*.

The great question is, whether he has receded from that defence, and really and distinctly in

1817.

WARD v. SHEPHERD and others.

terms, as he is bound to do, abandoned that defence. There is one difficulty, that in that view we must understand him to say that he believes it was a composition real within time of legal memory; and that in his amended answer he believes it was before,—that is something of an objection; but taking this as it stands on the first defence, it introduces but a few words on the subject of composition real.

Our difference of opinion is such as would make it extremely unbecoming to argue the question of the composition real being supported or not supported, with hostility, or an adverse turn of mind; but my opinion rests not on the authority of *Robinson* v. *Appleton*, nor the conviction of every lawyer I have talked with only, but on plain sense: and notwithstanding that case which is alluded to, of Lord *Hardwicke*'s, (the particular circumstances of which we do not know,) it may not unfairly be presumed that Lord *Hardwicke*, who had not been so conversant as other eminent persons with the practice in such cases, might have done what Lord *Mansfield* did,—misapply the doctrine of the acquiescence in tithes by length of time, in the case of the church, overlooking the plain distinction grounded on the maxim *nullum tempus occurrit ecclesiæ*. That is not only the acknowledged maxim now, but when it was suggested, and was the subject of consideration in the legislature, with a view to shorten the time with respect to the clergy, and prescribe some limit of time as applicable to them; I remember an admirable speech being made by Mr. *Skinner*, afterwards Lord Chief

1817.

WARD v. SHEPHERD and others.

Chief Baron, who impressed the House with the danger and impropriety of so doing; and the danger and impropriety of doing it would undoubtedly be extremely great, because, if you were allowed to support a defence of composition real by parol evidence of usage, so as to change it into a modus, it is perfectly clear that no man in his senses would ever plead a modus; because, by pleading at once a composition real, according to my learned brother *Wood*, a defendant would have the advantage of non-usage, and he would thus get rid of the objection as to rankness on all occasions. Not only so, but we should make every modus a composition real, and thus expunge the doctrine of moduses from the books. But it does more, because so many years have elapsed since the 13th *Elizabeth*, we could not tell, from a non-payment of 200 years, whether the composition were before or since the time of *Elizabeth*, and we should be giving validity to alienations of church property on the ground of prescription; for the period of the 13th *Elizabeth* will be just so far remote as to permit a defenant to set up composition without those instruments which the law constantly requires to be given in evidence to support such a defence. You would presume it on usage of 100 years; and in all the lesser possessions of the church, where poverty exists, and a frequent succession of incumbents takes place, these compositions would be set up on all occasions. Therefore, the distinction, I think, is wise and sound, and I shall never be induced to recede from that opinion which I have always held on these questions, and in which I am confirmed

on

1817.

SHEPHERD and others.

on the present occasion by the high authority of the Lord Chief Baron, and my absent brother *Richards*.

Then it brings us to this consideration,—What is the real and true defence which this defendant has been advised to make? I am sorry if there is a better, as if he could have said, I believe that the render of this equivalent has existed from time immemorial, that he has not done so; for if he had said so, I should perhaps have conceived that probably the evidence might apply; but he has taken his own choice, and stated it to be a composition real, and we are to conclude from that, that he is governed by a tradition in the parish, and on that he accordingly founds the statement in his answer. It must be taken that the tenants and their landlords knew perfectly well, and had it handed down to them, that it was a composition made some time shortly before the reign of Queen *Elizabeth*, and they even profess to make a search, in the repositories for documents of this sort, trusting that they shall find them. This being the shape of the case, how does the amendment put it? And now let us see what the defendant can fairly be understood to mean, and whether he does seriously mean to put his case on an immemorial modus; because, if he does not mean to do it, it is an act of injustice in the Court to say, we will suggest a ground for you that you are not aware of; because it would be sending the case to a jury with a prejudice. If, indeed, they had distinctly done so in the amended answer, I will admit that perhaps the circumstances of this

case might have justified their expecting that some further enquiry should be instituted. But let us see what the language of this answer so amended is, and whether in a court of justice we are bound to put a strained and forced sense upon it, and one which he has not chosen to do himself. Now the amended bill, I presume, from the nature of the answer, had only interrogated more particularly as to this supposed instrument which had been alleged to have been placed in the depositories of *Litchfield*, and had been lost in the general ruin and devastation of papers in the time of the civil troubles in this country. The plaintiffs wished to know more of the nature and particulars of that instrument, which was professed to be forthcoming; and the answer to that is, that the defendant again repeats the former part of his case with respect to the *Snapes*, and asserts that a composition deed once existed and is now lost; and it may be that he thought so; but so little does he give up the idea of its not existing at this time, that he says, that though it is not in his power to produce it, he believes the plaintiff has possession of it, for he says it is in the power or possession of the complainant. The words of the answer are: "and these defendants further say they "have been informed, and believe it to be true, "that a great number of ancient documents"— [for what purpose is this introduced, unless it is to shew a ground why the Court should step in to aid them under the loss of an instrument which they cannot produce?]—"that a great number of an- "cient documents, deeds, writings, &c. &c. in- "struments

1817.

WARD v. SHEPHERD and others.

" struments relating to the possessions of the " churches within the diocese of *Litchfield* and " *Coventry*, were destroyed during the time of " the civil wars, and that many evidences and " writings which were previously to be found in " the registry of the cathedral church of *Litchfield* " have been lost or destroyed; but these defend- " ants"—[now observe, they do not set out by saying that they believe that from time immemorial this composition had existed; but they give us merely the contents of the terrier of 1612]— " but these defendants say, that it appears from " a terrier of the said parish of *Langley*, in the " year 1612, and which appears to have been " signed by *Thomas White*, the rector of the " said parish, and by the churchwardens of the " said parish, and divers other persons, that " the said close called the *Little Snapes*, and the " horse-gate in the *Park*, had been accepted by " the predecessors of the said *Thomas White*, in " lieu and recompence of *Meynell Langley* tithes, " and that the same had been continued time out " of mind by way of composition."—They give you merely what this terrier consists of; there is no allegation, and no assertion on the part of the defendant that he believes this was continued by way of composition from *time whereof the memory of man runneth not to the contrary*; but he says only that this terrier was signed by *Thomas White*, the rector of the said parish, and by the churchwardens of the said parish and divers other persons: by which it appears that the *Little Snapes* and

1817.

WARD v. SHEPHERD and others.

and the horse-gate were accepted in lieu of tithes. Now we come to that which is to be construed into an assertion, that this has been an immemorial composition:—"And these defendants say, they verily "believe that no tithes in kind yearly arising "within the district or division of the parish called "*Meynell Langley*, have ever been paid to or "received by the complainant, or by any of his "predecessors, rectors of the said parish of *Church* "*Langley*, from time whereof the memory of "man is not to the contrary."—Now I admit that that is an allegation that he believes no tithes in kind have been paid from the time whereof the memory of man is not to the contrary; but that is not what he is called on to assert, because what he says is consistent with the terrier,—that there have been from time immemorial, compositions,—and he may therefore say very truly that he believes no tithes were ever paid: and I believe that that is the history of the parish, and I cannot say but that with respect to the terrier there is something like evidence that these compositions were continued from time to time; but that they must be shown to have been invariable to give them the effect of a modus.

In the year 1612, the number of acres of the *Snapes* was sixteen—(I do not rest on it as a strong circumstance, but it marks that there was in fact a variation in the arrangements of the composition from time to time so as to defeat its operation as a modus,)—and in 1682 they turn out to be thirty-two: now that goes in a great measure to shew the uncertainty

1817.

WARD v. SHEPHERD and others.

uncertainty of this kind of language, and that it does not come to the point,—that he believes this has been a payment from the time whereof the memory of man is not to the contrary; for there might have been nevertheless, and perhaps there had been, compositions from the earliest time. But the defendant says that all the lands are, and from the time aforesaid have been, by prescription or otherwise, legally exempted or discharged from the payment of all manner of tithes: what are we to understand by that case? I understand him not to have abandoned his resort to this composition real, which he has not yet found; there is therefore no allegation that he believes that they were, from time immemorial, exempt *by prescription* as the law of moduses requires; but he means to annex that composition pleaded in the first answer, and which he does not abandon, to the defence set up in the second answer. But at the next period he says, he does not doubt that he shall be able to prove this *composition*. Now we must expect a distinct allegation in these cases, and I would ask a plain question,—Could this man, at the time when he concluded his amended answer with a profession of an expectation to find this instrument, expect to be told, you have put your defence on a totally different ground? You have said it was an immemorial exemption, and therefore you are defeating your own claim, because you allege it at the same time to be a composition of the 1st or 2d of *Elizabeth*. It is going a great deal too far to say that that is the ground of

1817.

WARD v. SHEPHERD and others.

of the defence he makes, and it is not to be permitted him so to shift his ground. This is not one of those instances where a man has mistaken his case from the beginning. Where we see, upon the proper documents, that a man has really mistaken his ground of exemption, the Court will, in aid of ignorance or mistake, substitute one defence for another; but the Court will not suffer a man to put two defences, I will not say diametrically opposite, but at least very different, and certainly quite inconsistent, on the same record, to take his chance of the alternative,—that if the Court should be of opinion that he has not a composition, he may still call it a modus. That, according to my idea, ought never to be admitted. If one only puts the case in this way: Suppose the defendant had filed a bill and prayed for the establishment of this payment, or rather this commutation of the *Snapes*, and he had prayed it might be established as a composition real, or as a modus, I presume that would not be sustained. I am pretty clear, and I say it with some boldness, but subject to correction of higher authority, that if a man was to declare on the presumption of such a right, it would not do to say, I was exempt before the time of Queen *Elizabeth*; *or*, I am entitled by immemorial usage: that would be a demurrable declaration. But the principal ground is substantially this, he has put the case on the footing of a composition real alone; if, therefore, we are of opinion that there are not those traces to establish this composition real, the bill in the present case, without prejudice to another case now standing

1817.

WARD v. SHEPHERD and others.

ing for judgment, must be maintained. The answer is double, manifold, and uncertain. It is not filed upon the only ground it could succeed upon. Therefore I think there must be a decree for the tithes of such titheable matters (I need not go into a detail of them) as are admitted to have been in the possession of the defendants, and in that opinion I have the concurrence of my absent brothers.

Decree for the Plaintiff.
(without costs.)

END OF THE SITTINGS AFTER HILARY TERM.

INDEX

AN

INDEX

TO THE

PRINCIPAL MATTERS.

A.

ABATEMENT,

(Plea of.)

Vide PRIVILEGE.

ACTION

(Against Hundred.)

Vide PLEADING.

(For deceitful representation of profits of trade sold.)

Vide PLEADING.

(Against Sheriff.)

Vide BAIL.

ACT

(Of Bankruptcy.)

Vide BANKRUPTCY, N° 2.

ADVANCING

Cause in Paper.

Vide WITNESS.

AFFIDAVIT.

1. An Affidavit made after a rule to shew cause granted, is not admissible.
Ditchett v. *Tollett* - - - - 257

2. The Affidavit made in support of postponing the trial of a cause, on the

the ground of a commission to examine witnesses abroad not having been returned, should state that the return of it is expected, and at what time.
Attorney General v. *Laragoity*, 221

3. A Court of Error will not receive an affidavit of facts on an application for interest on affirmance of the judgment of the Court below, because the other party can have no opportunity of contradicting them.
Doran v. *O'Reilly* - - - - 250

4. *Vide* BAIL. — EXTENT. — POSTPONING TRIAL. — PRIVILEGE. — PARTICULARS *(Of Demand.)*

AFFIRMANCE

(Of Judgment.)

Vide INTEREST.—NOTICE.

AGREEMENT.

Vide CONTRACT.

AMENDING

(Bill.)

Vide REPLICATION.

AMENDMENT.

Vide RECORD.

AMOVEAS MANUS.

Vide EXTENT.

ANSWER.

1. A defendant will not be allowed to take his answer off the file for the purpose of correcting a mistake; the course is to file a supplemental answer.
Taylor v. *Obee* - - - - - - 83

2. If a defendant have only signed one (the first) skin of his answer, which is an irregularity, the Court will not order it to be taken off the file, but will permit the defendant to sign the others. And if he reside in the country, they will give him an opportunity of coming to town for that purpose.
Clarke v. *Mansfield* - - - - 605

(Accepting, effect of.)

Vide INJUNCTION.

APPEARANCE

(To Process.)

Vide DISTRINGAS.—EXTENT, N° 8.

APPROPRIATION

(Of funds to pay legacy, what.)

Vide LEGACY DUTY.

(Of Remittance by Bankers.)

1. A general remittance to bankers to whom the remitter is indebted, accompanied by a letter requesting them to pay certain specific sums to particular persons (not expressly out of the sum remitted

doe

does not so fix the bankers as to give the persons to whom such sums were so directed to be paid, a right of action against them for money had and received, without an assent on their part to such an appropriation of the money remitted.

Grant v. *Austen* - - - - - - 58

2. It is not necessary that the bankers should express a dissent from the required appropriation.

Ib.

ASSIGNMENT

(Of Insolvent's Effects not avoided by Extent.)

Vide DEMURRER.

(Of Bail Bond.)

Vide BAIL.

(Of Replevin Bond.)

1. A defendant in replevin is not entitled to an assignment of the replevin bond, on the plaintiff's neglecting to declare at the next county court, if he himself have not then appeared to the summons.

2. And if he obtain an assignment and bring an action, the Court will stay the proceedings (on an affidavit being made, that a writ of *recordari fac loquelam* has been sued out) without payment of costs by the defendant, which will be ordered to abide the event of the proceedings on the *re. fa. lo.*

Seal v. *Phillips* - - - - - - 17

ASSUMPSIT.

Vide PLEADING, N° 4.

ASSURANCE.

Vide BANKRUPTCY.

ATTACHMENT.

Vide INJUNCTION.—SUBPŒNA.

AVERMENT.

Vide PLEADING, *passim.*—RECORD.

AVOIDING

(Creditors.)

Vide BANKRUPTCY.

AUCTION,

(Sale by.)

Vide TENEMENT.

AUCTION DUTY.

1. Tenant in fee mortgaging for 1000 years, has no longer any estate or interest in the lands higher than an equity of redemption; and if, on

his becoming bankrupt, his assignees take upon themselves to sell the whole property absolutely as the estate of the bankrupt, such a sale is not within the exemption of the 19th Geo. III. ch. 56, sec. 15, and is therefore liable to the auction duty.

Quere, If the assignees had previously redeemed the estate?

Nor will the Court, on such a sale, deduct the proportional part of the duty payable on the value of the equity of redemption, for they consider the entire duty to be payable by the auctioneer on the whole, at the conclusion of the sale; and if the interests are blended so indiscriminately by the assignees, whose duty it is to keep them apart, the Court will not relieve them.

Rex v. *Abbott* - - - - - - 178

Vide PAVING BOND.—TENEMENT.

B.

BAIL.

1. In an action against a Sheriff, for not assigning a Bail Bond, the Court will not grant a motion to enter the recognizance of bail on the record as taken on the true day (it being always entered generally as of the term) to enable the plaintiff to proceed with his action.

Anon. - - - - - - - - - 36

Quere, If such an action be maintainable?

Ib.

2. The Court will stay proceedings on an assignment of a bail bond, the defendant having since perfected bail, on motion, with tender of payment of costs, on an affidavit of merits, or that the application is made in ease of the Sheriff, or bail, where a trial has not been lost. —Nor will they in such a case order the bail bond to stand as a security, requiring only that the plaintiff shall be put in the same situation as if bail had been put in in time and duly perfected.

Searle v. *Hale* - - - - - - 52

3. Proceedings against bail below will be stayed on motion (on payment of costs) where the plaintiff in the original action has been neglectful in proceeding against them on the bond as early as he might have done, even where a trial has been lost, if there has been reason, on the part of the bail, to think that the plaintiff did not mean to proceed in the action, such as the bankruptcy of the defendant.

4. But the bail bond will be ordered to stand as a security, if the bail have not applied to stay the proceedings on the earliest opportunity.

An affidavit made after a rule to shew cause granted is not admissible.

Ditchett v. *Tollett* - - - - 257

5. An indorsee of the same bill of exchange on which the principal had been arrested, and another person who had justified as bail in other actions, neither of whom had sworn in the affidavit of justification (which was in the common form) that he was worth double the sum sworn to, over and above the aggregate of all the other sums, were rejected as bail for the defendant.

Jones v. *Ripley* - - - - - 261

6. Time

6. Time being asked, the Court granted it to put in other bail, but would not allow the defendant merely to amend the affidavit or to offer again the same bail.
Ib.

7. One of bail being sworn to be clerk to an attorney, rejected.
Stoneham v. *Pink* - - - - 263

BAIL BOND.

Vide BAIL, Nos 1, 2, 3, 4.

BANKRUPTCY.

1. An underwriter is entitled (where the assured has become bankrupt after the policy of the insurance was effected) to deduct what was due to him before the bankruptcy on a balance of accounts between the assured and himself, from out of the amount of his subscription to the policy, in the event of a loss subsequent to the bankruptcy, under the 5th Geo. ch. 30. the Statute 19 Geo. II. ch. 32. sec. 2. suspending the effect of a bankruptcy in the case of an assured, and the underwriter on both sides, so as to let in the former statute till the result of the voyage shall have been ascertained and the accounts stated, because the 19 Geo. II. ch. 32. (admitting persons assured to claim losses against bankrupt underwriters, although happening after the bankruptcy,) is in *pare materiâ*, and the two statutes are to be construed with reference to each other, so as to make them mutually beneficial, and therefore it was held that a set-off must be allowed to a solvent underwriter by the assignees of a bankrupt assured under the 5th Geo. II. ch. 30.
Graham v. *Russell* - - - - 227

2. A trader being informed by the attorney of the petitioning creditor, that he has delivered a warrant to arrest him to a sheriff's officer, who is seeking him for the purpose of executing it, and is advised by the same attorney to repair to his office, to avoid the publicity of being arrested in the street, which he does, and remains there a considerable time;—held not to have committed an act of bankruptcy within the meaning of the statutes, so as to defeat an action against the sheriff by a judgment creditor to recover the proceeds of his goods taken and sold under a *fieri facias* sued out since the supposed act of bankruptcy.
Mills v. *Elton* - - - - - 142

BANKRUPT.

Vide AUCTION DUTY.

BARGAIN AND SALE.

Vide INROLMENT.

BARLEY.

Vide CUSTOM OF TYTHING.

BARREN LANDS.

Vide EXEMPTION FROM TYTHES.

BILL

(Of Exchange.)

Vide DEBT.—DISCHARGE (OF PERSONS LIABLE).

(Of Costs.)

(Taxing.)

Vide EXTENT.

(Of Lading.)

Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment, are not equivalent in effect to bills of lading endorsed.

Nichols v. *Clent* - - - - 547

BOND.

Vide BAIL.—INJUNCTION, N° 8.—DEMURRER IN EQUITY.—REFERENCE TO MASTER.—PAVING BOND.

BONDS TO CROWN.

The bonds given by Masters of vessels, under 26th Geo. III. ch. 40, are continuing bonds, and remain in force as long as the same person is Master of the same ship; but not when he becomes Master of any other vessel.

Rex v. *M'Leod* - - - - - 203

It is not necessary, therefore, that a fresh bond should be given on every voyage made by the vessel while in his charge, for the same bond covers all voyages made in her by him, and may be sued on for a breach of the condition during any one or more of them.

Ib. - - - - - - - - - - 203

BREACH OF INJUNCTION.

Vide INJUNCTION.

BRITISH SHIPS.

Vide IMPORTATION.

C.

CANVASS.

Vide EXCISE DUTIES.

CAPIAS.

Vide EXTENT.

CHARGES.

Vide EXTENT.

CHARGE ON LAND.

Vide INTEREST IN LAND.

CLERK

(In Court.)

Vide NOTICE OF TRIAL.

(Of Attorney.)

Vide BAIL, N° 7.

COLLECTOR OF TAXES.

Vide EXTENT.

COMPOSITION,

(Real.)

Vide MODUS, N°s 1.—PLEADING *(in Equity.)*

The objection to a composition real being presumed from usage, is founded on the maxim *nullum tempus occurit ecclesiæ.*
Ward v. *Shepherd* - - - - 607

COMMISSION TO EXAMINE WITNESSES.

Vide AFFIDAVIT, N° 2.—INJUNCTION, N° 7.—POSTPONING TRIAL OF INFORMATION.

CONSTRUCTION OF STATUTES.

1. A ship of foreign built (American) belonging wholly to a British subject, and manned with foreign seamen, is not, as within the 43d Geo. III. c. 153, entitled to import flaxseed from Russia.
Attorney General v. *Wilson* - 431

2. A privilege given by Act of Parliament to ships belonging to any state in amity with his Majesty, and manned with foreigners, to import merchandize otherwise prohibited, does not extend to foreign-built ships belonging to British subjects, it being a privilege to be construed *strictissimi juris.*
Ib.

Sed vide Campb. N. P. Rep. vol. 4. p. 364.

3. If a ship so importing, also bring into a British port other foreign articles not importable as merchandize, as dunnage, it is a question for the jury to say whether such goods were fairly brought over as such.
Ib.

4. Such vessels having an English mate on board, to be considered, notwithstanding, as being manned with foreigners, within the meaning of the Act.
Attorney General v. *Wilson* - - 431

5. *Vide* AUCTION DUTY.—BANKRUPTCY, N° 1.—BONDS TO CROWN.—LEGACY DUTY.—PAVING BOND.

CONSENT

(To appropriation of Money remitted.)

Vide REMITTANCE TO BANKERS.

CONSIDERATION,

(Inadequacy of.)

Vide CONTRACT.

CONSIGNMENT.

Vide BILL *(of Lading.)*

CONTRACT,

(Where fraudulent)

1. The Court will set aside a contract where there appears to have been great inadequacy of consideration, at a distance of more than seven years from the date of the deed, on proof of the inadequacy, and that the purchaser had knowledge of the value of the subject-matter, and was in the confidence of the vendor, and ought therefore to have protected her by his advice from imposition, rather than have misled her for his own advantage.
Taylor v. *Obee* - - - - - 83

2. *Vide* PLEADING.

CONTEMPT.

Vide INJUNCTION, *passim.*

CORN,

(Custom of Tithing.)

Vide TITHES.

(Standing.)

Vide TENEMENT.

COSTS.

1. If in an action on the 2d and 3d Edw. VI. where the first count is for the treble value of the tithes, and the others for the single value, a verdict be entered for the plaintiff on the whole declaration, by consent, subject to the award of an arbitrator, who directs the *postea* to be endorsed, 30*s.* treble value of the tithes, damages 1*s.*, costs 40*s.*, held to be within the 8th and 9th Will. III. and that the plaintiff was entitled to his costs of suit.
Pedley v. *Frampton* - - - - 474

2. A rule obtained on motion, founded on an opinion that a plaintiff was not so entitled under such circumstances, discharged *with costs.*
Ib.

3. *Vide* ASSIGNMENT OF REPLEVIN BOND, N° 2.—EXTENT, N° 4.—INJUNCTION, *passim.*—NOTICE OF TRIAL.—REFERENCE TO MASTER.—SUBPŒNA.

COUNT.

Vide PLEADING, N° 6.

COVENANT.

Vide DISSEISIN, N° 5.

CROSS CAUSE.

Vide EXAMINATION OF WITNESSES.

CUSTOMS.

Vide CONSTRUCTION OF STATUTE.

CUSTOM

(Of Tithing)

Vide TITHES.

D.

DECEIT,

(Action for.)

Vide PLEADING, N° 5.

DEBT.

1. Debt lies against the indorser of a bill of exchange, drawn by him and made payable to his order.

Stratton v. *Hill* - - - - - 253

2. Indorsement by the drawer does not give him a new character as indorser, or divest him of any liability to which as maker of the bill he would have been subject.

Ib.

DEED.

Vide LEGACY DUTY, N° 1.

DEMURRER.

1. Replication to a plea (in bar to an extent in aid) that defendant was trustee under a prior deed of assignment, for the general benefit of all the insolvent's creditors; that the prosecutor of the extent was indebted to the crown before and at the time of executing the deed; that the insolvent then carried on trade, and was not then seised of lands, &c.; that the insolvent was then indebted to the prosecutor; and that the prosecutor had not executed the assignment; held bad on general demurrer.

Such an assignment is not fraudulent against a creditor, unless there have been a commission of bankrupt sued out.

Nor can such a deed be avoided by the effect of an extent, as a commission of bankrupt may.

Rex v. *Watson* - - - - - - 6

(In Equity.)

Where the object of a bill *quia timet* is to prevent the assignees of a bankrupt, purchaser of an estate, from bringing an action to recover back that part of the consideration-money remaining due to the vendor which had been paid to him subsequent to the commission of the act of bankruptcy, on the ground of his having waved his equitable lien by taking a bond for the purchase-money, if the bill charge as a fact that the bond was given *as a further additional or collateral security*, the question of law cannot be raised on a general demurrer, because that fact must neccessarily be admitted.

Braband v *Hoskins* - - - - 31

Vide INJUNCTION, N° 2.

DEPOSITIONS.

1. Depositions in a cross cause taken after publication of those filed in the

the principal cause, not admissible in evidence on the hearing of the latter.

Taylor v. *Obee* - - - - - 83

2. *Vide* EXAMINATION; OF WITNESSES.

DEPUTY REMEMBRANCER.

Vide REFERENCE.

DISCHARGE

(Of parties liable on bill of exchange.)

Where all parties have had due notice of the dishonour of a bill of exchange, a subsequent indorser is not discharged by a treaty between the attorney of the holder, the drawer (who was also prior indorser) and the acceptor, that the holder should wait a given time for the payment of the balance, in consideration of receiving from the acceptor and prior indorser, by a certain time, a stipulated proportion of the amount, *a part only of which proportion was afterwards paid*;* although the subsequent indorser has had no notice of such treaty, or the result, nor was informed of the payment of any part of the money due on the bill, or of the ultimate non-payment of the balance till some months after the original dishonour of the bill.

Badnall v. *Samuel* - - - - 521

Sed nota, the subsequent indorser was the person to whom the holders had sold the goods for which the bill was given in payment, and the offer of a renewed bill, by the same parties, had been expressly rejected by them.

* *Quere*, if the whole had been paid, according to the engagement of the party asking the indulgence of time?

DISCHARGE

(Of a Defendant in custody under an Extent.)

Vide EXTENT.

(Of Defendant's person.)

Vide EXTENT.

(Of Partner from liabilities.)

(Of Surety in a Joint Promissory Note.)

Vide DISTRESS FOR RENT.

DISCOVERY.

A defendant in a bill filed for a discovery in aid of an action at law, charging that he has debited the plaintiff with larger sums, as paid on his account by the defendant than were actually paid by him, is compellable to answer whether that were so or not—and that although the accounts have been settled for several years, for there is no period of limitation in point of time within which such a bill must be filed—and though the defendants (men of good reputation) state a very strong case by their

answer; for the facts stated in an answer are not conclusive.

Whether an answer may be used, or may be useful if used in a Court of law, is for the consideration of the Court.

The true tests as to whether questions are to be answered or not, are, 1st. Whether the answers might lead to the crimination of the defendant; and 2dly, Whether they are relevant and may be material to the case of the plaintiff.

Mant v. *Scott* - - - - - 477

DISSEISIN.

1. A lease and entry by the lessee is not a disseisin in fact, unless the entry be forcible, or with a manifest intention to disseize.

Jerritt v. *Weare* - - - - 575

2. Acceptance of rent from the disseisee, amounts to a disclaimer of such intention.

Ib. - - - - - - - - - 603

3. It is also an *estoppal* by matter *in pais*.

Ib. - - - - - - - - - 602

4. A previous deed is also an *estoppel* by matter in writing.

Ib. - - - - - - - - - 602

5. A disseisin being the wrongful act of a stranger, it is not a breach of the covenant for validity of title, that the person under whom the vendor derives title, had leased part of the premises sold to one who had afterwards entered on the premises demised.

Ib. - - - - - - - - - 604

DISTRESS.

(For Rent.)

1. If a tenant, on whom his landlord have distrained for rent, give a promissory note for the amount jointly with another person to release his goods, and a subsequent distress be made on him for arrears of rent accruing due after the period to which the note referred, the produce of the sale of such latter distress must be applied in discharge of the note. The landlord cannot apply it in discharge of the subsequent rent, and then sue the person who joined in giving the note for the former rent.

Palfrey v. *Baker* - - - - 572

DISTRINGAS.

1. Where a defendant is abroad, a plaintiff may still (since the 51st Geo. III, ch. 124,) issue a *distringas* on service of the *venire facias*, for the purpose of compelling his appearance thereby, as he might have done before that act; but not for the purpose of enabling the plaintiff to enter an appearance for him, so that he may proceed thereon to final judgment, as if the defendant himself had appeared.

Nicholson v. *Brownass* - - - 263

2. Same point.

Dwerryhouse v. *Graham, in notis*, 266

DRAWER

(Of Bill of Exchange.)

Vide DEBT.

DUNNAGE.

(What.)

Vide CONSTRUCTION OF STATUTES.—IMPORTATION.

E.

ELECTION.

(Of process by Crown.)

Vide RECORD.

ENLARGING RULE.

Vide INJUNCTION, N° 5.

EQUITY

(Of Redemption.)

G. having a *fee simple* in lands, mortgages for *a term* of 1000 years; he has no longer any *estate* or interest in the lands higher than an equity of redemption only.
Rex v. *Abbott* - - - - - - 178

EQUITABLE LIEN.

Vide DEMURRER *(In Equity.)*

EQUITY OF REDEMPTION.

Vide AUCTION DUTY.

ERROR.

Vide PLEADING, *passim.*

ESTATE

(Of Bankrupt.)

Vide AUCTION DUTY.

EVIDENCE.

Vide EXTENT, N° 16.—RECORD, N° 1.—TERRIERS.

EXAMINATION

(Of Witnesses.)

1. The Court will not make an order on motion, that a plaintiff in a cross cause, (who has not examined witnesses on his part in the *original* cause, after having obtained an order to enlarge publication,) shall be at liberty to read depositions taken on his behalf in the cross cause, after publication of the depositions taken on the behalf of the plaintiff, on the hearing of the original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on the part of all parties interested, and their attornies, of the depositions published.
Ridley v. *Obee* - - - - - 96

Nor

Nor will they depart from their general rule in that respect, however satisfactory, in point of fact, the affidavit in support of such a motion may be in the particular instance.

Ib.

2. *Vide* EXTENT.

EXCEPTIONS.

Vide DISCOVERY.

EXECUTION.

Vide INJUNCTION.

EXEMPTION

(From Tithes.)

1. Where the defendants set up to a bill for tithes, a claim of exemption under the 2d & 3d Edward VI. cap. 13, and produced much evidence of the land in question requiring to be cleared and levelled; and that it gave more than usual trouble in ploughing, and cost more than the customary expence in manuring it with lime; the Court ordered an issue, to try whether the lands of which the tithes were demanded, "were of such a nature, as (exclusive of the labour and expence of clearing the same from furze or whins, and preparing the same for ploughing,) necessarily required extraordinary expence of liming and manuring, or labour to bring them into a proper state of cultivation.

Kingsmill v. *Billingsley* - - 465

2. *Vide* TENEMENT.

EXCISE DUTIES.

1. The scenes of the theatres, and all other canvass so painted, are liable to the duties of excise as painted linen.

Attorney General v. *Brandon* - 360

2. Canvass is linen within the statutes.

3. But where the canvass has been previously primed, it is not liable to any further duty for being afterwards painted, the primer having paid a duty in the first instance, in respect of the colour necessarily laid on in that preparatory operation.

Ib.

4. *Vide* AUCTION DUTIES.—TENEMENT.

EXPARTE

(Examination of Witnesses.)

Vide EXTENT.

EXTENT.

1. After a defendant has obtained time to plead to an extent, he cannot take any objection to the affidavit on which it is founded, by motion.

The proper course is to crave oyer and demur.

Rex v. *Rippon* - - - - - - 38

2. On an extent in aid, (or even on an immediate extent,) where goods and chattels of the debtor have been seized to an amount, according to the

the appraisement, beyond what is sufficient to satisfy the debt due to the Crown, the debtor's lands cannot be sold.

Rex v. *Hopper* - - - - - - 40

2. Under such circumstances, the Court will, on motion, grant an *amoveas manus* by an order to shew cause, on the defendant's paying into the receipt of the Exchequer the debt, without the costs.

Ib.

3. Costs are not recoverable where goods and lands are seized, the goods alone being more than sufficient to pay the debt levied, not even in the case of an immediate extent. The Stat. 25 Geo. III. c. 35. held not to give the Crown a right to costs in cases where it is not necessary to resort to a sale of the lands.

Ib.

4. *Quære*, Whether in the case of lands being actually sold under an extent in aid, the prosecutor would be entitled to costs.

Ib.

5. Where a Crown debtor is entitled to an extent in aid by the practice of the Court, it is not necessary that he should have the sanction of the Revenue solicitors, or of the officers of any of the Revenue Boards.

Rex v. *Williams* - - - - - - 75

6. Before the late Act (2d July 1817) a manufacturer liable to duties of Excise on the articles made by him, growing due from day to day, was entitled to an extent in aid, although he gave no bond to the Crown; but it is not so now. *Vide* the 4th section of that Act (page 80 in these Reports.)

7. The Crown is entitled to an extent against such persons immediately on the articles being manufactured, although not then charged with such duties.

Rex v. *Williams* - - - - - - 75

8. The *capias* clause of the writ of extent is not usually enforced; and where there have been also effects seized sufficient to satisfy the debt, the Court seemed disposed to order the discharge of a defendant taken under it, on his giving security for his appearance at the return of the writ.

Rex v. *Plaw* - - - - - - - 94

And *vide* the late Statute, page 80, in these Reports.

9. An inquisition returned, finding special matter, without drawing and stating some conclusion as a fact, is bad, and will be quashed on motion. As, if it find that money arising from the effects of *A.* had been placed in the hands of *B.* a banker, as the property of *A.* by *C.* and *D.* his assignees under a commission since superseded; but that *A.* was then indebted to *B.* in a larger amount than the money so placed in his hands, which still remains owing, unless *B.* has a right to retain the same towards discharging the said debt.

Rex v. *Sherwood* - - - - - 269

10. *Quære*, Whether a set-off can be pleaded against a claim enforced by Extent?

Ib. - - - - - - - - - 269

11. Where the inquisition has been so quashed, it is necessary to issue a new writ, the former having been returned.

Ib.

12. The

12. The sheriff is entitled to levy costs under 42d Geo. III, c. 99. on an Extent against a collector of taxes; and the sheriff's poundage is included in the word charges,' and may be levied; and it is payable where the money is paid in before a *venditioni exponas* has issued, although that proceeding is obviated thereby.
Rex v. *Collingridge* - - - - 280

13. But if the agent in the country of the solicitors for taxes have received any money from the defendant, as costs under the levy, or the sheriff have taken any thing for extra costs, as for bailiff's fees, and keeping possession, the court will order them to refund.
Ib.

14. It does not seem to be necessary, under that Act, that the Commissioners should issue their warrants against the collector to recover the duties detained, to authorize the issuing of an Extent against him, as a condition precedent; or if it be, it is rather a ground of a motion to set aside the Extent for irregularity.
Ib.

15. The bill of the solicitors prosecuting the Extent for the Crown may be taxed.
Ib.

16. The inquisition to find debts, &c. on an Extent is not wholly an *ex parte* proceeding; and a claimant of property in the goods enquired of may assert his claim before the sheriff, and put material questions to witnesses examined by him on the part of the prosecution, in the way of cross examination, to shew that the goods belong to him.
And if the sheriff refuse to permit such interrogatories to be put, the Court will set aside the Extent and inquisition.
Ib. - - - - - - - - - - 280

17. *Quære*,—Whether a claimant is entitled to bring forward other evidence in support of his claim?
Rex v. *Bickley* - - - - - - 454

18. A defendant taken into custody under an Extent in aid (the sheriff having also seized his property, being more than sufficient to cover the demand) ordered to be discharged.
Where his property (seized and returned) is ordered to be restored to him on his giving approved security, and it is delivered up by the sheriff before the security be approved, the remedy must be against the sheriff for not having the property forthcoming; not against the party for not giving such security.
Rex v. *Kinnear* - - - - - - 536

19. *Vide* VENDITIONI EXPONAS.

F.

FARM MODUS.

Vide MODUS.—TERRIERS.

FELONIOUSLY,

(Where that word not necessary in Criminal Pleading.)

Vide INDICTMENT.

FELONIOUSLY,

(Where not necessary in Civil Pleading.)

Vide PLEADING, N°s 7 & 8.

FIERI FACIAS.

Vide BANKRUPTCY.

FINDING OF JURY,

(Special, where insufficient.)

Vide EXTENT, N° 9.

FORFEITURE OF SHIPS.

(As to Right of Crown to seize for, after sale.)

A judicial sale of a vessel, found at sea and brought into port as derelict, under an order of the Instance Court of the Admiralty, on the parts of the salvors and claimant without fraud) is available against the Crown's right of seizure for a previous forfeiture incurred by the ship having been guilty of a forfeitable offence against the revenue laws, although the Crown was not a party to the proceeding in the Admiralty Court, other than by the King's Procurator General claiming the vessel as an Admiralty droit; and although no decision of droit, or no droit, was awarded, and the sale took place, *pendente lite*, under an interlocutory order.

The Crown should have claimed before the Court, either as against the ship in the first instance, or subsequently against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale, or have moved a prohibition.

Attorney General v. *Norstedt* - 97

FOREIGN-BUILT SHIPS.

Vide IMPORTATION.

FOREIGN SEAMEN.

Vide IMPORTATION.

FRAUD.

Vide CONTRACT.

H.

HEARING.

Vide REFERENCE to DEPUTY REMEMBRANCER.

HUNDRED,

(Action against.)

Vide PLEADING.

I.

INDICTMENT.

An indictment on the 43d Geo. III, ch. 58. charging in one count, that *A.* feloniously, wilfully, maliciously, and unlawfully, and of his malice aforethought, did shoot at *B.* with intent feloniously, &c. to kill, &c. and that *C.* and *D.* were then and there aiding and abetting said *A.* the felony aforesaid, in manner and form aforesaid, to do and commit, against the form, &c.; and in another count charging the act of shooting on a person unknown, in the same words as before; and that all three *A. B.* and *C.* were then and there aiding and abetting him the felony aforesaid, in manner and form aforesaid, to do and commit (omitting the word 'feloniously' to the aiding and abetting) held good on the whole, notwithstanding that omission, the statute having made aiders and abetters principal felons; although the Jury, having found *A.* guilty generally and acquitted the others, afterwards expressly negatived that *A.*'s was the hand that fired.

Rex v. *Towle* - - - - - 145

INDORSER.

Vide BAIL.—DEBT, N° 2.

INDORSEMENT

(Of Record.)

Vide INROLMENT.

INFORMATION,

(Trial of.)

Vide POSTPONING, &c.

INJUNCTION.

1. Where an action at law has been brought on a bail bond given to the sheriff on an attachment from the equity side of this Court, for not answering according to the condition, and a verdict have been recovered; if the defendant, instead of pleading the answer put in, pleads *non est factum*, and refuses to settle with the plaintiff by paying the costs pending the action, when he had an opportunity, before the judge on a summons, this Court will not restrain the plaintiff from taking out execution, (although the defendant has answered since the action brought) but on the terms of all the costs at law being paid, notwithstanding the plaintiff has not (as he ought to have done) refused to accept the answer when it came in, till the contempts were cleared, but has actually waived them, by excepting to the answer and amending his bill.

Hurd v. *Partington* - - - 222

2. But the Court will not order the defendant (at law) to pay the costs in equity also, because they are waived, by the plaintiff accepting the answer.

Ib.

3. A bill filed to restrain a plaintiff at law from proceeding on five different policies of insurance, effected on different ships, between the same

same parties at the same time, is not demurrable for multifariousness.

Kensington v. *White* - - - 167

4. Where four of many actions against the various underwriters on several policies (individually) had been tried, and verdicts passed for the plaintiffs at law, the Court granted an injunction to restrain them (the plaintiffs at law) from proceeding further, in a case where there was strong suspicion of fraud in the assured, on the money being paid into Court, on the ground of the answer of one of the defendants not having come in.

Ib. - - - - - - - - - 168.

(But see *Whitmore* v. *Thornton*, infra.)

5. And the Court of Common Pleas enlarged their rule, which had been obtained for a new trial, until the same time.

Ib. - - - - - - - - - 169.

6. The Court will dissolve the injunction, if the amount of the losses claimed be not paid into Court; and they will not permit money so paid in to be taken out on the ground of great lapse of time between the filing of the bill and the putting in the answer, unless it clearly appear that the delay was gross and wilful on the part of the defendant, and that he was plainly not disposed to answer at all.

Ib. - - - - - - - - - 172.

7. A commission to examine witnesses abroad will be granted, under such circumstances, on the coming in of defendant's answer, although not prayed by the original bill, and the injunction will be in the mean time continued.

Note.—The defendant had been very dilatory in putting in a sufficient answer.

Ib. - - - - - - - - - 173, 174.

8. The Court will grant an injunction to restrain a landlord from proceeding at law on an assignment of a replevin bond against the sureties, if there have been an agreement to refer, and a reference between the landlord and a tenant (without the concurrence of the surety) of the matters in difference, whereby the performance of the condition of the bond (to proceed with effect) have been suspended.

On such an agreement having been entered into the bond became *functus officio*.

Bowmaker v. *Moore* - - - 214

9. The Court will set aside an injunction (granted *(after trial and verdict obtained)*, on the ground that one of the defendants, plaintiffs at law, in whom the interest was averred to be, was in contempt for not having answered, and that his answer was most material to the defence at law of the plaintiffs (in equity) to the action, as it might shew that the property was not in truth in him; and that although the affidavit of merits, on which it was obtained, contain allegations of strong facts in support of the plaintiff's equity; and although the court of law have since, on the same facts having been brought before them on motion for a new trial, granted a rule *nisi*, against which cause has not yet been shewn.

Whitmore v. *Thornton* - - - 241

10. Such

10. Such an order can only be obtained before verdict, and if obtained after, will be discharged on motion.
Ib.

11. Showing cause against a rule *nisi* for a new trial, is not a breach of an injunction.
Ib.

INQUISITION.

Vide EXTENT, *passim.*

INROLMENT.

A deed of bargain and sale, enrolled under the statute, held to have been rightly enrolled as of the day when it was brought into the Inrolment Office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk, or in fact received by him till two days afterwards.
Rex v. *Hopper* - - - - - 495
Eagle v. *Garrick* - - - - 516

Vide RECORD.

INSTANCE COURT OF ADMIRALTY.

Vide FORFEITURE OF SHIPS.—IMPORTATION.

INTEREST.

1. In an action of debt on a foreign judgment, for an entire sum recovered on counts for the balance of a merchant's account for goods sold, monies advanced and paid, monies due on bills of exchange, and for interest, this Court will not give interest on affirmance of the judgment of the Court below.
Doran v. *O'Reilly* - - - - 250

2. Where interest is given, the debt must appear on the record to be one which carries interest.
Ib.

3. The Court will not, on such an application, act on facts stated to them by affidavit, because the other party can have no opportunity of contradicting them.
Ib. - - - - - - - - - - 250

4. *Vide* NOTICE.—REFERENCE TO MASTER TO TAKE ACCOUNT, &c.

(In Land.)

Vide AUCTION DUTY.—EQUITY OF REDEMPTION.

IRREGULARITY OF PROCEEDINGS.

Vide PRACTICE.

(In issuing.)

Vide SCIRE FACIAS.

(In Service of Writ.)

Vide RECORD.—SUBPŒNA.

ISSUE.

Vide EXEMPTION FROM TITHES, N° 1.—MODUS.—TERRIERS.

J.

JUDICIAL SALE OF VESSELS.

Vide FORFEITURE OF SHIPS.

JUDGMENT.

(When it may be signed.)

Vide PRIVILEGE.

(When carrying Interest on Affirmance.)

Vide INTEREST, N° 1.

JUDGMENT CREDITOR.

Vide BANKRUPTCY, N° 2.

JUSTIFICATION

(Of Bail by Affidavit.)

Not within the Rule of E. T. 56 Geo. III. 35

L.

LAND,

(Charge on, and interest in.)

Vide PAYING BOND.

LANDS,

(When not to be seized.)

Vide EXTENT.

LANDLORD AND TENANT.

Vide DISTRESS.—INJUNCTION.

LEGACY.

Vide LEGACY DUTY.

LEGACY DUTY.

1. If a man give by deed his leasehold and personal property to trustees, for the use of himself for life, and of several persons therein named at his death, with a power of revocation reserved—never having parted with the deed, or with any part of the property during his life, and confirming, in most respects such disposition of it by will at his death; those two instruments will be considered as to be taken and construed together as testamentary instruments, and the property passing under them will pass as legacies, and be subject to duty.

Attorney General v. *Jones* - - 368

2. Payment into the Bank by trustees (who were also executors of the will of the testator) of money bequeathed to them in trust to pay legacies under a decree of the Court of Chancery, ordering that the money should be so paid in and laid out in the purchase of stock in the name of the accountant-general, which was accordingly done

done before the 10th of October 1808, held to be a retaining, &c. of the legacy by the executors, within the words of the 48 Geo. III, ch. 149. sect. 3, and therefore exempt from the legacy duty imposed by that act (although it was not actually paid over to the persons beneficially entitled to the legacies till after that time) because the money was taken out of the hands of the executors, by their obedience to the order, and, as as far as they were concerned, was thereby appropriated to the trusts of the will at that time.

Hill v. *Atkinson* - - - - - - 399
Atkinson v. *Hill* - - - - - - *ib.*

LETTING TITHES.

Vide TENEMENT.

LIABILITY,

(For Damage by Servants.)

Vide PILOTS.

(Of Partner.)

Vide PARTNER.

LIEN.

1. An actual possession given to a factor by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of it. Such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by the bankrupt.

Nichols v. *Clent* - - - - - - 547

2. Nor is a delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, and requesting him, on the faith of such consignment, to accept bills (which he accordingly accepts and pays), such a constructive delivery to a consignee as will give him a lien against the assignees—it is not within the principle of the cases, which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien not perfected by possession.

Ib.

LIEN.

(Equitable.)

Vide DEMURRER *(in Equity.)* WAIVER.

LIMITATION.

(Of Suits in Equity.)

There is no limitation, in point of time, within which a bill for discovery in aid of an action at law must be filed.

Munt v. *Scott* - - - - - - 477

LINEN.

Vide EXCISE DUTIES.

M.

MANNING SHIPS

(With Foreigners.)

Vide IMPORTATION.

MEMORANDA - 1. 141. 473

MODUS,

(Farm.)

1. A modus of 2*l.* 8*s.* 1*d.* payable for certain tithes within a township, the occupier of each farm or tenement within the said township respectively paying his rateable proportion, is bad for uncertainty, even in an answer. It is defective in form and substance.
Neither can it be treated as a composition, for the same reason.
Wolley v. *Hadfield* - - - - 210

2. Modus of 16*d.* a score for agistment of sheep, bad.
Mytton v. *Harris* - - - - 19

3. *Vide* CUSTOM OF TITHING.—TERRIERS.

MORTGAGE TERM.

Vide AUCTION DUTY.

MORTMAIN.

(What Instruments within.)

Vide PAVING BOND.

MOTION

In arrest of judgment on *sci. fa.* must be made within the first four days of term.
Rex v. *M'Leod* - - - - - 203

MOVING

(To set aside Proceedings, when to be made.)

Vide MOTION.—PRACTICE.—SCIRE FACIAS.

MULTIFARIOUSNESS

(In Pleading.)

Vide INJUNCTION.

MUTUAL CREDIT.

Vide BANKRUPTCY, N° 1.

N.

NAVIGATION LAWS.

Vide IMPORTATION.

NEW TRIAL.

Vide NOTICE OF TRIAL.

NOTICE.

The warrant for arresting a ship by the Admiralty, and the process of citation,

citation, is notice to all the world of the subsequent proceedings.
The Attorney General v. *Norstedt*, 97

NOTICE OF TRIAL.

Where the defendants in a joint information employ two different attornies and clerks in Court, if notice of trial be served on one of them only, and a verdict be obtained, the Court will set it aside, and award a new trial as to both, notwithstanding the offence charged be one which would affect them both as partners in trade: the costs of the trial already had, to abide the event of the second verdict.
The Attorney General v. *Stevens*, 72

NOTICE,

(Service of.)

Service of notice of motion for interest, on affirmance of a judgment of the Court below, by leaving it with the occupier of the house where the plaintiff in error had lodged, and who informed the person calling for that purpose, that the plaintiff in error was abroad, but that she was authorized to receive all letters for him, is insufficient.
Anonymous - - - - - - 253

O.

OATS.

(Tithes of.)

Vide CUSTOM OF TITHING.

ORDER

(For time to plead, effect of.)

Vide VENUE.

OYER,

(Craving.)

Vide EXTENT.

P.

PAINTED LINEN.

Vide EXCISE DUTIES.

PAPER MANUFACTURERS.

Vide EXTENT.

PARTNERS.

1. A creditor is entitled to sue a dormant partner of his debtor—if unknown to him to be so at the time of furnishing the subject matter of the debt - for whatever had been supplied to the firm during the partnership.
Robertson v. *Wilkinson* - - - 538

2. It is not an answer to the circumstance on which the reason of the rule is founded—the partnership not having been known to the

plaintiff—that it might have been known to him if he had used diligence, inasmuch as the defendant (the partner not originally known) had been a *registered* part-owner of the ship on account of which the goods had been supplied, at the time, because the register is not readily accessible, nor conclusive when found.

Ib.

3. None of the acts done by an ostensible partner, which are usually held to operate to discharge the others—such as selecting one, accepting new bills, &c.—will operate to discharge a partner not known to the creditor, if done during the time of the concealment of such partner.

Ib.

4. *Vide* DISTRINGAS.

PARTICULARS

(Of Plaintiff's Demand.)

An order for delivering particulars of a plaintiff's demand will not be made, if the defendant refuse to swear that he does not know the precise amount of the plaintiff's claim. See the note in page 60.

Grant v. *Austen* - - - - - 58

PAVING BOND.

1. The several instruments (called bonds) given for securing on the parish rates, the payment of 100*l.* each (and interest) to the holder, by parishes enabled to borrow money by such means under the local Paving Acts; held not to be a mere chattel, but a charge on the owners of houses, &c. in respect of such houses, &c. and therefore, when sold at auction, are not liable to the higher auction-duty imposed on the sale of chattels by the 43d Geo. III. c. 69, but to the lower duty, as being a sale of an interest in lands, &c.

2. And such instruments would come within the Statutes of Mortmain.

PAYING MONEY INTO COURT.

Vide INJUNCTION, *passim.*

Rex v. *Bates* - - - - - - 341

PILOTS.

1. The owners of a merchant vessel running foul of and damaging a King's ship lying in the Mersey, by misconduct of the persons on board, held liable in an information for damages, in the nature of an action on the case, although she had on board, at the time of the accident, a pilot duly licensed, because the Liverpool Local Pilot Act is not of itself (or by reference to the 52d Geo. III, ch. 39.) imperative, compulsory or penal, on the captain to take a pilot on board whilst lying at anchor, but merely subjects him to the payment of the pilot's regulated allowance on refusal.

2. The 30th sec. of the 52d Geo. III, ch. 39. (which is commonly, but improperly, called the General Pilot Act) discharging masters and owners of vessels having pilots on board, from responsibility for damage

mage occasioned by the neglect of the pilot; held not to apply to vessels having on board pilots appointed for other places than those expressly named in the preamble or provisions of that Act.

3. Where that Act does apply, the Crown is equally bound with the subject, although not named.

The Attorney General v. *Case* - 302

PLEA.

Vide PRIVILEGE.

PLEADING,

(In Equity.)

A defendant in a tithe cause having set up a defence of composition real, cannot afterwards rely on its being in fact a modus.

Such a defence is double, and too uncertain.

As to the mode in which the defence was laid, and whether it were doubtful if the defence, though approaching more nearly in form to a composition real than a modus, might not be consistent with a statement of modus,—see the terms of the answer as given verbatim, in its several doubtful parts, in the course of the judgment.

Ward v. *Shepherd* - - - - 607

Vide CUSTOM OF TITHING.—DEMURRER.

PLEADING,

(Criminal.)

Vide INDICTMENT.

PLEADING.

1. It is not necessary in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach.

Squier v. *Hunt* - - - - - - 68

2. Proof that it was part of the contract, that plaintiff should pay for the goods by bill at two months on invoice or delivery, is not a fatal variance from a statement in the count that they were to be paid for by a bill at two months.

Ib.

3. Demand of delivery of the goods sold is sufficient proof of an averment that plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant, when he was not himself present to have done so, if required, on the spot.

Ib. - - - - - - - - - - 68

4. Special assumpsit is the proper form of such an action.

Ib.

5. In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that defendant represented the returns to amount to a certain sum, is material and must be precisely proved notwith-

notwithstanding it must be laid under a *videlicet*. And a variance between the allegation and proof is a good ground of nonsuit after verdict.

Gilbert v. *Stanislaus* - - - - 54

6. In cases of doubt, there should be separate counts to let in proof of the precise fact.

Ib.

7. It is not ground of error that the plaintiff (in an action against a hundred on the 41st Geo. III, ch. 24. and 1st Geo. I, ch. 5. for recovery of damages for injury done to him by the demolition of his mills by persons riotously assembled) do not allege in his declaration that such demolition was felonious, or that the persons riotously assembled acted feloniously.

Beatson v. *Rushforth* - - - 48

8. It is sufficient to sanction a civil action, if it appear from the allegation of the acts done, that a felony has been committed by them.

Ib.

9. *Vide* EXTENT, N° 1. — FORFEITURE OF SHIPS.

POSTPONING TRIAL OF INFORMATION.

1. If the trial of an information has been once postponed at the instance of the Attorney-general, *pro defectu juratorum*, the Court will also grant the defendant a rule to shew cause why the trial should not be further postponed, on his application, if in the mean time a material witness deposed to have been ready on the former occasion, is not forthcoming.

Attorney General v. *Hughes* - 35

2. The Court will not postpone the trial of an information on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think that there have been sufficient time for its return.

It should be stated in the affidavit, in support of such an application, that the return is expected, and when.

The Attorney Gen. v. *Laragoity*, 221

POUNDAGE.

Vide EXTENT.

PRACTICE.

All motions to annul proceedings on the ground of irregularity, must be made in the term when the proceeding was had, or the Court will not receive the application.

Anon. - - - - - - - - - 37

Vide AFFIDAVIT.—EXTENT.—MOTION.

PRESUMPTION.

(From Usage.)

Vide COMPOSITION.

PRIVILEGES OF BRITISH SHIPS.

Vide IMPORTATION.

PRIVILEGE

(Of Attorney.)

1. If a plea in abatement (of privilege) be not supported by a proper affidavit, the plaintiff may sign judgment immediately.
Richards v. *Setree* - - - - 197

2. A mistake in the parties of the suit, in the title to such an affidavit, renders it insufficient to support the plea, although it refer expressly to the annexed plea in which the title of the cause is right.
Ib.

3. *Quære*,—Whether an attorney of another Court is entitled to plead his privilege in abatement against the privilege of the officers of this court.
Ib.

4. The Court will not permit cause to be shewn, before the day for which the rule is drawn up, for the sake of enabling the party to save the term; *sed quere*,—if that be suggested at the time of the application. Nor will they impose terms with a view to expedite the execution of a writ of inquiry.
Richards v. *Setree* - - - - 197

PROHIBITED GOODS.

Vide IMPORTATION.

PROMISSORY NOTE.

Vide DISTRESS.

PROOF.

Vide COMPOSITION. — PLEADING, N° 2.—PRESUMPTION.

PUBLICATION

(Of Depositions.)

Vide EXAMINATION OF WITNESSES.

Q.

QUIA TIMET,

(Bill of.)

Vide DEMURRER IN EQUITY.

R.

RECOGNIZANCE.

A defendant having been committed to prison on a forfeited recognizance, whereby his wife and family are become burthensome to the parish, is not a sufficient ground for the discharge of the defendant from such recognizance.
Rex v. *Stancher* - - - - 261

RECORD.

1. The endorsement by the clerk of the enrolments of the day of the enrolment, by way of date, is a part of the record, and cannot be averred against; nor is evidence admissible to shew that it was in fact enrolled on some other day; and that although the date be written on an erasure.

Rex v. *Hopper* - - - - - 495

2. If an inquisition to find debts executed in vacation be returnable in the following term, and a writ of *scire facias* be issued thereon tested as of the term preceding the vacation, the Court will set it aside for the repugnancy which must appear on the face of the record; nor will they allow it to be aided by inserting the true dates by means of a memorandum on the record.

Rex v. *Pearson* - - - - - 288

REFERENCE

(Of Title to Deputy Remembrancer.)

This Court will not (on a bill for specific performance,) make an interlocutory order to refer a title, the validity of which is denied by the answer, and depends on facts, to the Deputy Remembrancer, until the cause is brought to a hearing, without consent.

Bowyer v. *Bright* - - - - 300

(To Master, to take account.)

The Court will not refer it to the Master, to take an account of what is actually due on bond for principal and interest, and costs, after a verdict obtained by the plaintiff, on the bond having been put in suit.

Eastmond v. *Holl* - - - - - 219

REMITTANCE

(To Bankers.)

Vide APPROPRIATION.

REPLEVIN BOND.

Vide ASSIGNMENT.

REPLEVIN.

Vide INJUNCTION.

REPORT,

(General.)

The Court will not direct the Deputy Remembrancer to proceed to make a general report, until the previous orders for separate reports are regularly disposed of, although he have before him a full state of facts.

Lewes (Sir Watkin) v. *Morgan*, 175

REPLICATION,

(Withdrawing.)

After a plaintiff has twice amended his bill, and filed a replication for cause against a second order *nisi* to dismiss, as against a defendant who has not caused delay, the Court will not permit the replication to be withdrawn for the purpose of further amending the bill, by striking out the name of such defendant, and in other respects, for they will set bounds to dilatory proceedings.

Turner v. *Calvert* - - - - - 161

Vide DEMURRER.

RETAINER OF LEGACY.

Vide LEGACY DUTY.

RETURN.

Vide RECORD.

RESPONSIBILITY

(Of Owners, for damage by Servants.)

Vide PILOTS.

REVENUE.

Vide EXCISE DUTIES.—FORFEITURE OF SHIPS.—LEGACY DUTY.—IMPORTATION.

S.

SALE

(Of Tithes.)

Vide TENEMENT.

(Judicial, of Ships derelict, where Crown's right by forfeiture excluded.)

Vide FORFEITURE OF SHIPS.

SCIRE FACIAS.

1. The Court will set aside a writ of *scire facias*, issued on an Extent, if the warrant for the commission to find debts have not been signed by a Baron, no application having been made for such signature.

Rex v. *Thompson* - - - - - 278

2. Where a writ of *scire facias* is moved to be set aside as having been irregularly *issued* (not as having been irregularly *served*) the motion may be made after appearance.

Ib.

3. The Crown has not an election to

proceed against its debtor either by extent or *scire facias*, where the debtor is not insolvent.

Ib.

4. A *scire facias* may be issued in vacation, but only where the debt which it seeks to recover is actually due, before the end of the preceding term, or it must be tested as of the next subsequent term.

Ib.

SECRET PARTNER.

Vide PARTNER.

SECURITY.

Vide BAIL.—STAYING PROCEEDINGS.

SERVICE

(Of Process.)

Vide DISTRINGAS.—SUBPŒNA.

(Of Notice.)

Vide NOTICE.

(Of Distringas, where one of Partners is abroad.)

Vide DISTRINGAS,

SET-OFF.

Vide BANKRUPTCY.—EXTENT.

SETTING ASIDE

(Subpœna.)

Vide SUBPŒNA.

(Process.)

Vide SCIRE FACIAS.

(Scire Facias.)

Vide RECORD.

SHERIFF.

Vide EXTENT, *passim.*

(Action against.)

Vide BAIL, N° 1.

SHIP-OWNERS.

Vide PILOTS.

SHIPS.

Vide IMPORTATION.

SHOOTING.

Vide INDICTMENT.

SHEWING CAUSE.

1. The Court will not permit cause to be shewn before the day for which the rule is drawn up, for the sake of enabling the applicant to save the term.
Richards v. *Setree* - - - - 197

2. Shewing cause against a rule *nisi* for a new trial, is not a breach of an injunction against proceeding at law.
Whitmore v. *Thornton* - - - 241

SIGNATURE

(Of a Baron, where indispensable.)

Vide SCIRE FACIAS.

STATE

(In Amity with Britain, what.)

Vide IMPORTATION.

STATUTES,

(Public.)

Edward III.

27. c. 13. (Salvage.) - - - - 105

Henry VII.

3. c. 2. *(De muliere abducta.)* - 153

Henry VIII.

1. c. 8. (Sec. 2, giving Evidence before Commissioners) - - 458
27. c. 10. (Inrolment.) - - - - 307
32. c. 7. s. 7. (Tithes.) - - - 328
32. c. 28. (Tithes.) - - - - 332
33. c. . (Seizing Lands of Crown Debtor - - - - - - 45

Edward VI.

2 & 3. c. 13. s. 5 & 6. (Exempting barren Lands from Tithes) 465
2 & 3. (Costs) - - - - - - 474

Elizabeth.

1. c. 19. ( ) - - 333
10. c. 10. ( ) - - ib.
13. (Fraudulent Assignment.) - 14
13. c. 4. (Selling Lands of Crown Debtor.) - - - - - - - - 43
43. c. 4. (Rates.) - - - - - 336

James I.

1. c. 8. (Stabbing.) - - - - 153

William III.

8 & 9. (Tithes.) - - - - - - 475

Charles II.

12. c. 18. (Navigation Act.) - 486

Anne.

4. c. 16. s. 13. (Referring Bonds to Master.) - - - - - - - 220
10. c. 19. (Excise Duties.) - - 360

George I.

1. c. 5. (Action against Hundred) 50
5. c. 11. (Smuggling.) - - - 101
9. c. 22. (Black Act.) - - - 154

George II.

5. c. 17. (Tithes.) - - - - 329
5. c. 30. s. 28. (Bankruptcy—Mutual Credit.) - - - - 229
9. c. 26. (- .) - - 357
17. (Distraining for Rates.) - 355
19. c. 32. s. 2. (Bankruptcy—proving Debts by an assured.) 238

George III.

5. c. 17. (Enabling Stat.) - - 333
19. c. 56. s. 14. (Auction Duty.) 337
19. c. 56. (Auction Duty.) - - 182
19. c. 56. (Auction Duty.) - - 325
24. c. 41. (Excise Duties.) - - 360
25. c. 72. (Excise Duty.) - - ib.
25. c. 35. (Extent Costs.) - - 41
25. c. 35. (Extent.) - - - - ib.
26. c. 40. s. 15. (Bonds by Masters of Ships.) - - - 203
32. c. 50. s. 9. (Bonds required from Masters of Coasting Vessels.) - - - - - - 206
35. (.) - - 41
35. c. 73. (Auction Duties.) - 341
36. c. 52. (Legacy Duty.) 375, 403
39. c. 59. (Smuggling.) 97. 101. 107. 111.
41. c. 24. (Action against Hundred.) - - - - - - - - 48
43. c. 99. s. 41. (Costs on Extent.) - - - - - - - - 281
43. c. 69. Sched. A. (Excise Consol. Act.) - - - - - 182
43. c. 69. Sched. A. (D°) - - 325
43. c. 69. (Excise Duties.) - - 360
43. c. 153. (Importation.) 433. 445. 448. 453.
43. c. 58. (Malicious Shooting.) 145
45. c. 30. (Auction Duties.) - 344
45. c. 28. s. 4. (Legacy Duty.) - 378
48. c. 149. (Legacy Duty.) - - 368
48. - - - 403
49. (Importation.) - - 443
51. c. 124. (Distringas.) - - 246
52. c. 39. (Pilot Act.) - - - 304
53. c. 163. (Auction Duties.) - 341
56. c. 117. (Extent.) - - - - - 94
57. c. 117. s. 4. (Extent.) - 80. 94.
20. c. 28; 23. c. 58; 29. c. 51; 36. c. 52; 44. c. 98; 45. c. 28; (Legacy Duty.) - - - - 403

PRIVATE.

6th Geo. I. c. 11. (Brentford Turnpike.) - - - - - - - 154
10th Geo. I. c. 6. (Ditto.) - - 356
37th Geo. III. c. 78. (Liverpool Pilot Act.) - - - - - - - 302
46th Geo. III. (Mary-le-bone Paving Act.) - - - - - - 342

Vide BANKRUPTCY. — CONSTRUCTION OF STATUTES.—DISTRINGAS. — EXEMPTION FROM TITHES. — EXTENT.—IMPORTATION.—LEGACY DUTY.—PAVING BOND.—PILOTS.—TENEMENT.

STAYING PROCEEDINGS.

The Court will stay proceedings on an assignment of a bail bond, the defendant having since perfected bail on motion, without tender of payment of costs or any affidavit of merits, or that the application is made in case of the sheriff or bail, where a trial has not been lost; nor will they in such case order the bail bond to stand as a security—requiring only that the plaintiff shall be put in the same situation as if bail had been put in in time and duly perfected.

Vide ASSIGNMENT OF REPLEVIN BOND, N° 2.—BAIL, N°s 2 & 3.

SUBPŒNA.

1. If a copy of subpœna *ad. resp.* be left with a servant of defendant's brother (who was also his partner, and a co-defendant in the suit) at whose house such servant acknowledged that he resided, will be good service, although the party be out of the kingdom at the time.
Birdwood v. *Hart* - - - - 176

2. And a rule for (setting aside an attachment) obtained on a representation that the party was abroad at the time of service, will be discharged on such cause being shewn, with costs.
Ib.

SUPPLEMENTAL ANSWER.

Vide ANSWER.

T.

TAXES.

Vide EXTENT, *passim*.

TENEMENT.

1. Tithes are a Tenement; and when sold by auction are within the exemption (from duty) of 19 Geo. III, ch. 56. s. 14.
Rex v. *Ellis* - - - - ; - 323

2. Tithes of corn growing, *let* in July by auction, and to be transferred by a lease for one year, to commence from the day before the auction, is a letting of a *tenement*, and not a *sale* of so much of the titheable matter, and that although no actual lease should be in fact executed.
Ib.

TERM

(Of Years.)

Vide EQUITY OF REDEMPTION.

TERRIERS.

Old terriers, recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus attempted to be established, by proof of a money payment having been uniformly rendered beyond living memory, in the absence of any evidence even of reputation, that the tithe had ever been taken in kind from the farm; and that although such terriers are now proved to have been signed by any person interested in the farm.—*Wood* B. *dissentiente*.
Mytton v. *Harris* - - - - 19

2. Nor will the court grant an issue in such a case.
Ib.

TESTE.

Vide RECORD.—SCIRE FACIAS.

TESTAMENTARY INSTRUMENT.

Vide LEGACY DUTY.

TIME.

(To Plead.)

Vide EXTENT, N° 1.—VENUE.

(Given to put in bail.)

Vide BAIL.

TITHES.

Vide COSTS.—CUSTOM OF TITHING.—EXEMPTION FROM TITHES.—MODUS.—PLEADING IN EQUITY.—TENEMENT.—TERRIERS.

TITLE.

Vide REFERENCE OF, TO DEPUTY REMEMBRANCER.

(Of Plea.)

Vide PRIVILEGE.

TRIAL.

(Of Information.)

Vide POSTPONING, &c.

TRUSTEE.

Vide DEMURRER.

U.

UNDERWRITER.

Vide BANKRUPTCY.

V.

VACATION.

Vide RECORD.—SCIRE FACIAS.

VARIATION.

Vide PLEADING.

VENDITIONI EXPONAS.

The Court, on application of claimants, will, by rule to shew cause, order a *venditioni exponas* to issue before the due time arrive for selling the goods of a bankrupt, seized under an extent, on an affidavit that it would benefit the bankrupt's estate, because the price is expected to fall, &c.; the sheriff to pay the prosecutor's demand into the hands of the Deputy Remembrancer, to the credit of the cause, and

and the remainder to the assignees: the defendants (the claimants) paying into Court 100*l.* beyond the amount of the debt claimed by the prosecutor.

Rex v. *Cripps* - - - - - - 606

VENDOR AND PURCHASER.

Vide CONTRACT.—DEMURRER IN EQUITY.

VENIRE.

Vide DISTRINGAS.

VENUE.

The defendant cannot, in this Court, change the venue, after having obtained an order for time to plead "*on the usual terms*" generally. It is considered to be one among what are commonly expressed in the order to be the usual terms imposed by it on giving time, that the defendant shall not afterwards move to change the venue.

When the order is intended to be without prejudice to a change of venue, it should be so expressed in the summons for attending the Judge.

Nor will the Court order a change of venue in such a case, although the defendant proposes to give judgment of the term.

Waring v. *Holt* - - - - - - 3

VERDICT.

Vide INJUNCTION.

W.

WAIVER

(Of Equitable Lien.)

Vide DEMURRER IN EQUITY.—INJUNCTION, N° 2.

WILL.

Vide LEGACY DUTY.

WITNESS.

The Court will not order a cause which is set down for hearing, to be advanced in the paper, on the ground that the subject matter of the Suit is an arbitration of matter of account, and that if the award should be set aside the applicant would, on going into the Account again, which he would then be obliged to do, probably lose the advantage of a material and essential witness, who is old and bed-ridden, and not expected to live.

Dalzell v. *Bailey* - - - - - - 2

Vide EXAMINATION OF.—POSTPONING TRIAL.

END OF VOL. II.

Printed by Luke Hansard & Sons,
near Lincoln's-Inn Fields, London.

ERRATA.

Page 23, *last line, for* age *read* usage.

Page 105, *lines* 11 and 12, *for* as well against all titles of the Crown, *read* against all titles as well of the Crown.

Page 344, *for* sec. *read* cap.

Page 376, *line* 10 *from bottom, for* was *read* are.

Page 420, *line* 3 *from bottom, for* The pay modus of 2 *d.* for a day's math. They—*read,* To the hay modus of 2 *d.* for a day's math they.

Page 458, *line* 10, *for* very *read* every.

Stanford Law Library
3 6105 062 832 022